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Supreme Court of the United States

October Term 1978

No. 78-540

THE NEW YORK TIMES COMPANY and MYRON FARBER,
Petitioners,

v.

THE STATE OF NEW JERSEY and MARIO E. JASCALEVICH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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v.

THE STATE OF NEW JERSEY and MARIO E. JASCALEVICH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

Petitioners, The New York Times Company ("the *Times*") and Myron Farber ("Farber"), a journalist employed by the *Times,* respectfully pray that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of New Jersey, entered on September 21, 1978, affirming by a 5-2 vote convictions for criminal and civil contempt. The criminal punishments imposed are a fine of $100,000 upon the *Times* and a six-month jail sentence and fine of $1,000 for Farber; the civil punishments are a fine of $5,000 per day upon the *Times* for every day until the underlying order at issue has been complied with and indefinite incarceration of Farber until he complies with the order.*

The convictions arise out of an underlying order requiring petitioners to produce to the Court, before any hearing whatever and in plain violation of what the New

---

* Thus far, the *Times* has paid fines amounting to $130,000 and Farber has been incarcerated for 27 days.

Jersey Supreme Court conceded to be both the language and intended statutory construction of the New Jersey Newspaperman's Privilege Law, *all* materials gained in the course of reporting with respect to more than one hundred witnesses called or to be called in an ongoing criminal proceeding. Petitioners believe that their convictions were accomplished in violation of deeply rooted principles of due process of law and that the decision of the New Jersey Supreme Court is based upon palpable misapprehensions as to and misinterpretations of both First Amendment and Sixth Amendment rulings of this Court.

Opinions Below

The Opinion of the New Jersey Supreme Court is unreported and is annexed as Appendix A to this petition (pp. 1a-55a).* The Order to Produce of the Superior Court of New Jersey, Law Division, dated June 30, 1978 is unreported and is annexed hereto as Appendix B (pp. 56a-57a). The oral opinion of the same Court issued June 30, 1978 is unreported and is annexed hereto as Appendix C (pp. 58a-64a). The opinion of the New York Supreme Court dated June 2, 1978 requiring petitioners to comply with the subpoenas is unreported and is annexed hereto as Appendix D (pp. 65a-67a). The Requisitions for Prisoner of the Superior Court of New Jersey, Law Division are annexed hereto as Appendix E (pp. 68a-71a). The subpoenas are annexed hereto as Appendix F (pp. 72a-77a).

Jurisdiction

The final judgment of the New Jersey Supreme Court was entered on September 21, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970).

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* Documents referred to in this petition which predate the final judgment of the New Jersey Supreme Court have been previously furnished to the Court at the times stays were sought therefrom.

Questions Presented

1. Whether, consistently with the due process clause of the Fourteenth Amendment to the United States Constitution, a newspaper and one of its journalists may be fined and imprisoned for failure to comply with subpoenas served upon them (a) where, pursuant to the plain language and acknowledged intent of the state newsman's shield law, such material may *not* be ordered produced and only the later decision of the state Supreme Court affirming the convictions of contempt held that the full and intended protections of the law could not constitutionally be afforded; (b) in the absence of an opportunity to contest the scope or validity of the subpoenas when, pursuant to the opinion of the state Supreme Court, all other journalists in the future will be afforded such rights, and when the convictions of contempt are themselves based upon factual findings not made by the Court below and to which petitioners were given no opportunity to respond; and (c) where jurisdiction over Farber was gained in a manner directly contrary to the terms of the Uniform Act to Secure Attendance of Witnesses and the clear representation of a New Jersey court to a New York court that Farber would be immune from service.

2. Whether, a state is constitutionally obliged under the Sixth and Fourteenth Amendments to the United States Constitution to hold unconstitutional, as applied to a criminal case, a state newsman's shield law adopted in response to this Court's ruling in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

3. Whether, consistently with the First and Fourteenth Amendments to the United States Constitution, journalists may be required to disclose to the Court the entirety of their files with respect to published articles when the subpoena pursuant to which such materials are sought is

patently overbroad and where the Court has refused to engage in or permit any case-by-case balancing at all as set forth in *Branzburg* v. *Hayes, supra*, 408 U.S. at 709-10 (Powell, J., concurring).

Constitutional and Statutory Provisions Involved

Relevant portions of constitutional and statutory provisions involved herein appear at the end of this petition at pp. 1s-3s.

Statement of the Case

This proceeding is an adjunct to a New Jersey criminal prosecution, *New Jersey* v. *Jascalevich*, Indictment No. S-495-76, a prosecution in which Mario E. Jascalevich is accused of multiple murders allegedly committed by the use of the drug curare. Articles written by Farber and published in the *Times* nearly a decade after the deaths were instrumental in leading to the renewed investigation and eventual prosecution of Jascalevich.

The subpoenas in question in this case were aptly characterized by the State of New Jersey, in the brief submitted by its Attorney General to the New Jersey Supreme Court, as "all inclusive" (Br. p. 35). They demanded the production by the *Times* and Farber of "all statements, pictures, memoranda, recordings, and notes of interviews of [over 100] witnesses for the defense and prosecution . . . as well as information delivered to the Bergen County Prosecutor's office and contractual information relating to the above which are in the possession, custody or control" of petitioners (App. F, pp. 73a-74a; 76a-77a).*

* For the information of the Court, both Farber and the former prosecutor in the Jascalevich case have already testified that the *only* document given to the prosecutor by Farber was a single deposition which had been misplaced by that office; copies of the deposition are in the possession of both the prosecution and the defense.

A. *Interlocutory Proceedings Prior to Incarceration and Fine*

On May 17, 1978, Hon. William J. Arnold of the Superior Court of New Jersey, Law Division, Bergen County, purporting to act pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, N.J. Stat. Ann. § 2A:81-18 *et seq.* (West 1976), issued a certificate stating that certain materials alleged to be in the possession, custody or control of petitioners were material to the Jascalevich case. The certificate was issued *ex parte* on the application of Raymond A. Brown, counsel for Jascalevich, and was based solely upon the affidavit of Mr. Brown; the affidavit is, in turn, entirely bereft of any factual support for the initial finding of materiality.*

A hearing was held on May 31, 1978 before a Justice of the New York Supreme Court, New York County, pursuant to New York's codification of the Uniform Act, N.Y. Crim. Proc. L. §640.10 (McKinney 1971). On June 2, 1978, Justice Harold Rothwax of the New York Supreme Court issued an opinion-order requiring petitioners to comply with the subpoenas *duces tecum*. In his opinion Justice

* As later summarized by Mr. Justice Marshall, in his opinion of August 4, 1978 denying a stay:

> "Initially defense counsel submitted *ex parte* to the Superior Court judge an affidavit averring the need for 'notes, memoranda, reports, statements, tape recordings and other written memorializations' of Farber's interviews of witnesses. The affidavit provided only one example of a statement given to Farber by a potential witness. With respect to the other material requested, the affidavit included only a general assertion of necessity, but afforded no factual basis for the judge to determine whether any of the documents other than the statement mentioned above were material, relevant, or necessary for the defense. It cannot be supposed that the Superior Court judge knew from conducting the trial that the material requested met those criteria, because counsel failed to specify the materials that came within the terms of his extremely broad request. Conclusory assertions by the defense counsel are insufficient to justify a subpoena of the breadth of the one involved here." (47 U.S.L.W. at 3069.)

Rothwax observed that New Jersey afforded immunity from service to witnesses rendered pursuant to this Act, and that he anticipated the New Jersey courts would afford petitioners "a hearing . . . at which all issues of privilege, statutory and constitutional, may be raised." Justice Rothwax also observed that "New Jersey courts are bound to allow full faith and credit to the laws of New York when necessary to protect the statutory entitlements of New York citizens" (App. D, p. 67a).

After the Appellate Division of the New York Supreme Court and a single Judge of the New York Court of Appeals dismissed as not appealable an appeal from Justice Rothwax's ruling, petitioners moved in the New Jersey Superior Court, Bergen County, for an order quashing the subpoenas *duces tecum*, arguing, *inter alia*, that the subpoenas should be quashed because (1) the subpoenas were sweepingly overbroad, particularly in light of First Amendment considerations; (2) there had been no showing of materiality of or necessity for the materials sought; and (3) the materials sought were protected against compelled disclosure by the United States Constitution and by the shield laws of New York and New Jersey—the latter of which, by its terms, explicitly protected journalists against being obliged to "disclose" to *"any court"* the "source . . . from or through whom any information was procured . . . and . . . [a]ny news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1978-79) (emphasis added).

At a hearing on June 30, 1978, Judge Arnold stated that he would not hear argument on nor would he rule on the merits of petitioners' motion to quash the subpoenas *duces tecum* unless and until the Court first had the opportunity to examine *in camera* all the sought materials in petitioners' possession. As phrased by the Court:

> "When the items are produced, this Court will give the applicants a full hearing as to the materiality of the subpoena, its scope and its contents.
>
> The Court will also decide if the items are barred by the Shield Law and any other legitimate defense that may be asserted." (App. C, p. 62a)*

As later summarized by Mr. Justice White in his opinion of August 1, 1978 denying a stay, "Judge Arnold informed petitioners that he would not rule on the merits of their motion to quash until he had the opportunity to examine in camera the documents." (47 U.S.L.W. at 3066)

Judge Arnold thereupon issued an order (hereinafter "Order to Produce") denying petitioners' motion to quash and requiring them to produce all the subpoenaed documents to him *prior to* any consideration whatsoever by the Court of *any* of petitioners' substantive arguments (App. B, p. 57a). Judge Arnold also issued an order to show cause why petitioners should not be held in criminal contempt of the Order to Produce.

Motions for stays and leave to appeal were denied by the New Jersey Superior Court, Appellate Division on July 3, 1978 and by the New Jersey Supreme Court on July 6, 1978. Petitioners' application to this Court for a stay of the July 6, 1978 order of the New Jersey Supreme Court was denied by Mr. Justice White by opinion dated July 11, 1978 (98 S.Ct. 3058) and by Mr. Justice Marshall by opinion dated July 12, 1978 (98 S.Ct. 3060), on the ground that the case was not ripe for review at that time.

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* Judge Theodore W. Trautwein who tried and convicted the *Times* and Farber of the contempts from which review is sought in this Court, characterized Judge Arnold's order as follows:

> "'I want your notes and materials and everything else that your investigation produced plus whatever was used as a basis for your articles. I want you to respond to the subpoena *duces tecum* by delivering those materials to me.'" (Transcript of Hearing July 14, 1978, p. 19)

At the criminal contempt hearing on July 14, 1978 (which was conducted before another judge, the Honorable Theodore W. Trautwein) the *Times* entered a plea of not guilty. Counsel for Farber argued, *inter alia*, that the Court lacked jurisdiction over Farber because the order to show cause which had initiated the criminal contempt proceeding had been served improperly upon him outside the State of New Jersey, and, accordingly, no plea was entered for Farber. In response to Farber's argument, Judge Trautwein (1) directed counsel for Jascalevich to apply to Judge Arnold "for an additional Order to Show Cause in aid of litigants" pursuant to New Jersey Court Rule 1:10-5 (Transcript of Proceedings of July 14, 1978, pp. 35-36); (2) issued a bench warrant for Farber's arrest (*id.*, p. 36); and (3) ordered counsel for Jascalevich to pursue his remedies in New York under its codification of the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings. (*Id.*, pp. 36-38) The Court continued the criminal contempt proceeding against petitioners until July 19, 1978. (*Id.*, p. 34)

On July 17, 1978, counsel for Jascalevich presented to the Supreme Court of New York, New York County, a certificate issued by Judge Arnold pursuant to the Uniform Act "adjudging [Myron Farber] to be a material witness and in possession of material documents and requesting his immediate arrest." Pursuant to the requirements of the Uniform Act, said certificate stated, *inter alia*, that Judge Arnold did "hereby certify:

• • •

> 10. That Myron Farber, upon coming into the State of New Jersey will be given protection from arrest or the service of process upon him, civil or criminal, as set forth in the New Jersey Statutes Annotated 2A:81-18 *et seq.*"

At a hearing held before the New York Supreme Court on July 18, 1978, counsel for Jascalevich served an order issued by Judge Arnold the previous day requiring Farber to appear before Judge Trautwein on July 26, 1978 to show cause why he should not be held in contempt in aid of litigant pursuant to New Jersey Court Rule 1:10-5. That order to show cause initiated the civil contempt proceeding herein as against Farber.

After the July 18 hearing, and without addressing the substantive issues raised by petitioners, the New York Supreme Court ordered Farber, in the custody of his attorneys, to appear before Judge Arnold forthwith. Farber did so and the Deputy Attorney General for New Jersey moved for an amendment of the July 3, 1978 order to show cause in the criminal contempt proceeding in order to expand the time within which Farber could be served. Over objections that Farber was present in New Jersey pursuant to the Uniform Act and that he was therefore immune from service of process, both civil and criminal, under the Act's explicit terms, Judge Arnold amended his previously improperly served order to show cause to require Farber to appear before Judge Trautwein in the criminal contempt proceeding on July 19, 1978 and permitted immediate service on Farber in his courtroom.

On July 24, 1978, a hearing on the criminal contempt was held before Judge Trautwein at which time both petitioners were found guilty of the charges therein. The Court imposed upon Farber the maximum penalty of six months incarceration and a fine in the amount of $1,000 to be paid within twenty-four hours. The Court imposed upon the *Times* a fine in the amount of $100,000 to be paid within twenty-four hours.

Immediately following the criminal contempt proceeding, a hearing was held before Judge Trautwein in the contempt proceeding in aid of litigant.

The Court found both petitioners guilty and imposed a fine upon the *Times* in the amount of "$5,000 per day for every day that elapses until there is compliance with Judge Arnold's Order," and imposed upon Farber a fine in the amount of $1,000 and incarceration "until he complies with Judge Arnold's Order" (Transcript of Proceedings of July 24, 1978, p. 80). The Court further ordered that the six-month punitive sentence of incarceration imposed upon Farber for criminal contempt commence upon compliance with Judge Arnold's Order to Produce of June 30, 1978.

Upon application of counsel for petitioners for a stay of both the punitive and coercive sentences, Judge Trautwein consulted counsel for Jascalevich who made "a conscientious objection to the incarceration" (*id.*, p. 82), stating that he did not want Farber incarcerated. Nonetheless, the Court denied petitioners' application for a stay of the order entered "in aid of" Jascalevich on the ground of the Court's own perception of "the urgency of the matter" (*id.*, p. 83). Petitioner's application for bail was similarly denied (*id.*). Farber was immediately taken into custody and incarcerated.

After oral argument on July 24, 1978 before a three-judge panel, the Superior Court of New Jersey, Appellate Division, stayed the order of the Superior Court in the criminal contempt proceeding pending the appeal therefrom and denied petitioners' motion for stay of the order of the New Jersey Superior Court in the civil contempt proceeding pending appeal and denied the motion for allowance of bail pending the appeal. On August 3, 1978, the Appellate Division provided for an expedited briefing schedule for the appeals in both the criminal and civil contempts, but one which did not permit argument until September 18, 1978.

On July 25, 1978, the Supreme Court of New Jersey entered orders (1) denying the motion of petitioners for

direct certification; (2) denying petitioners' motion for a stay of Judge Trautwein's order in the contempt proceeding in aid of litigant and (3) granting an interim stay of the coercive sentence in the contempt proceeding in aid of litigant to allow petitioners to seek relief from this Court.

After each had issued temporary stays, Justices White and Marshall ultimately denied in separate opinions petitioners' application for a stay pending a determination by this Court of the application and a further stay pending the filing of a writ of certiorari or, in the alternative, pending the resolution in the New Jersey State courts of petitioners' appeals. Mr. Justice White denied petitioners' application for a stay on the ground that he would not vote to grant certiorari with the case in its then present posture and that he was "unconvinced that four other Justices would do so" (47 U.S.L.W. at 3067). Mr. Justice Marshall denied petitioners' reapplication for a stay, noting that "[t]he applicants here bear an especially heavy burden, for a single Justice will seldom grant an order that has been denied by another Justice" (47 U.S.L.W. at 3069) and stating that he was "compelled to deny" (*id.*) the requested relief since he could not "conclude in good faith that at least four Justices would vote to grant a writ of certiorari with the case in its present posture." (*Id.*) However, Justice Marshall noted that, but for the heavy burden to be met by a party seeking a stay in those circumstances, he would have ruled differently:

> "Were I deciding this issue [of whether, in the context of the instant case, a judge must make threshold determinations of materiality, relevance and necessity before requiring the production of subpoenaed materials for *in camera* inspection] on the merits, I would grant a stay pending the timely filing of a petition for certiorari or at least pending the Appellate Division's consideration of the important constitutional and statutory issues raised by the applicants." (*Id.*)

With respect to the merits of the constitutional issue raised by petitioners in their application, and raised again herein, Mr. Justice Marshall stated:

> "Given the likelihood that forced disclosure even for *in camera* review will inhibit the reporter's and newspaper's exercise of First Amendment rights, I believe that some threshold showing of materiality, relevance, and necessity should be required. Cf. *United States* v. *Nixon*, 418 U.S. 683 (1974). See generally *Carey* v. *Hume*, 492 F.2d 631 (DC Cir.), *cert. dismissed under Rule 60*, 417 U.S. 938 (1974); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394 (DDC 1973)." (*Id.*)

On August 4, 1978, Farber surrendered to the Sheriff of Bergen County. Farber was then incarcerated, and remained incarcerated for twenty-seven days, in the Bergen County Jail, Hackensack, New Jersey. Commencing August 4, 1978, and up until the stay issued by the New Jersey Supreme Court on August 30, 1978, the *Times* paid $5,000 per day to the State of New Jersey.

B. *The Attorney General's Application*

On August 18, 1978, the Attorney General of New Jersey, whose office had prosecuted the criminal contempt, moved the Appellate Division for a remand of these consolidated matters to the Superior Court, Law Division, Bergen County, with directions to conduct

> "a hearing to consider in sequence the following: (1) the applicability and scope of the News Media Privilege (*N.J.S.A.* 2A:84A-21 and 21(a), Rule 27 of the *New Jersey Rules of Evidence*), (2) a determination as to whether the privilege, if applicable, has been waived pursuant to Rule 37 of the *New Jersey Rules of Evidence*, and (3) a hearing as to the breadth of the subpoena and the materiality and relevance of the documents encompassed by the subpoena. Assuming the applicability of the privilege, no waiver, a sufficiently narrow subpoena and the unavailability of less intrusive and non-privileged means of procuring the information, then the court on remand should conduct a limited *in camera* inspection of the material to endeavor to balance the claims of need, materiality and relevance as asserted by counsel on behalf of defendant Jascalevich, and the constitutional basis thereof, with the values embodied in the New Jersey News Media Privilege." (Br. pp. 1-2)

On August 25, 1978, the Appellate Division denied the motion without opinion. The Attorney General moved immediately in the New Jersey Supreme Court for leave to appeal, remand and emergent relief. Petitioners supported the Attorney General's request for remand, subject to various caveats, including the contention that any remand order should be accompanied by an order vacating both the criminal and civil contempt findings of and sanctions imposed by the Superior Court; alternatively, petitioners requested that the Supreme Court grant their earlier petition for certification.

On August 30, 1978, the Supreme Court stayed all coercive sanctions and scheduled argument on the criminal and civil contempts and on the motion of the Attorney General for remand for September 5, 1978.

C. *The Decision of the New Jersey Supreme Court*

On September 21, 1978, the Supreme Court of New Jersey, by a 5-2 vote, affirmed the contempt convictions.*

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* The unwillingness of the New Jersey Supreme Court even to remand for the hearing sought by the State of New Jersey, as represented by its Attorney General, was the second time the New Jersey courts imposed or continued sanctions on petitioners in opposition to the views of the parties the sanctions were supposed

The opinion for the Court of Justice Mountain first rejected, based upon *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the argument of petitioners that First Amendment interests required a balancing process involving examination of whether there were alternative sources for the information sought and whether the sought information was relevant to the issue of guilt or innocence rather than to any collateral issue (App. A, p. 9a). Justice Mountain's opinion held that there was no First Amendment protection at all in this area.

With respect to the New Jersey shield law, Justice Mountain first concluded that:

> "We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey. It is abundantly clear that appellants come fully within the literal language of the enactment. Extended discussion is quite unnecessary. Viewed solely as a matter of statutory construction, appellants are clearly entitled to the protections afforded by the act unless statutory exceptions including waiver are shown to apply." (App. A, pp. 11a-12a)

Notwithstanding this view of the intent and purport of the New Jersey statute, the majority opinion held that the statute did not protect petitioners from being obliged

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to aid or vindicate. As noted above, the incarceration of Farber for civil contempt was imposed "in aid of" the litigant who sought information from Farber; yet incarceration was ordered by the Court over the explicit opposition of counsel to that litigant. As may be evident, at all aspects of these proceedings, even the views of litigants opposing the *Times* and Farber were rejected in favor of the imposition by the judiciary of sterner, less accommodating and more coercive measures.

to comply with the subpoenas. Basing its opinion on the proposition that it was "unassailable" that "where Constitution and statute collide, the latter must yield" (App. A, p. 13a), the Court held that the New Jersey statute must yield in this case. Based upon rulings of this Court in two Sixth Amendment cases—*Washington* v. *Texas*, 388 U.S. 14 (1967) and *United States* v. *Nixon*, 418 U.S. 683 (1974) —the Court held that the New Jersey counterpart and exact duplicate of the Sixth Amendment, Article I, ¶ 10 of the New Jersey Constitution, "prevails over this statute." (App. A, p. 16a)

The majority then concluded that although *in camera* inspection "is not in itself an invasion of the statutory privilege" (App. A, p. 16a), such inspection would only be allowed in the *future* after (a) a preliminary determination as to whether a journalist or newspaper did or did not qualify for the statutory protection and (b) a preliminary determination by the court that the information sought was material and relevant to a defense, "that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it." (App. A, p. 18a)

In this particular case, however, the Court held that no hearing at all was required or would be afforded, since such findings were, on the record before Judge Arnold, "quite inescapable." (App. A, p. 19a) That conclusion was, in turn, based upon a series of "assertions" made in the brief filed on behalf of Dr. Jascalevich, plus some newspaper articles written well prior to June 30, 1978 to which Judge Arnold had adverted. (App. A, pp. 21a-23a) (No opportunity was afforded petitioners to respond to any of the "assertions" and, of course, no cross-examination was permitted of anyone with respect to them.)

Justice Pashman's dissenting opinion emphasized that Farber had never received any hearing prior to being

obliged to turn over all his materials to the Court. "I find it totally unimaginable," Justice Pashman concluded,

> "that the majority can even consider allowing a man to be sent to jail without a full and orderly hearing at which to present his defenses. Mr. Farber probably assumed, as did I, that hearings were supposed to be held and findings made *before* a person went to jail and *not afterwards.*" (App. A, pp. 29a-30a) (emphasis in original)

As respects the New Jersey shield law, Justice Pashman found the law constitutional under this Court's *Branzburg* ruling (App. A, p. 34a). Finally, after summarizing the hearing he believed should have occurred, Justice Pashman concluded as follows with respect to the "original fact-finding" engaged in by the Supreme Court.

> "The trial judge's conclusions upon which the majority places so much reliance were not the product of a hearing below in which appellants were allowed to participate. Rather, these conclusions derive solely from the judge's examination of a handful of newspaper articles. *See State* v. *Jascalevich*, 158 *N.J.Super.* 488, 493 (Law Div. 1978). The 'further support' upon which the majority bases its findings of fact, see *ante* at (slip opinion at 28-31), does not even derive from the trial judge. Instead, the majority's 'findings' are taken substantially verbatim from conclusory allegations contained in the statement of facts section of the brief for Dr. Jascalevich. This amalgam of *post-hoc*, *ex parte*, and newspaper article 'factfinding' is not my idea of what a Shield Law hearing is all about." (App. A, p. 39a)

Justice Handler also dissented, emphasizing that in a variety of post-*Branzburg* rulings of courts around the

country,* the need for the balancing approach set forth in Mr. Justice Powell's *Branzburg* concurrence had been recognized (App. A, p. 63a). Recognizing that a "reporter's conduct in obtaining and recounting news is a matter of constitutional consideration," Justice Handler concluded that far greater deference to First Amendment principles should have been accorded (App. A, p. 47a).

As respects the New Jersey shield law, Justice Handler stated that although the granted privilege was not absolute, it should not be given "middling" or grudging treatment. *In camera* inspections, Justice Handler held, should only be permitted where:

> "a defendant has demonstrated in convincing fashion that (1) such information probably contains evidence relevant and material to the question of guilt; (2) in the context of the criminal trial such information appears necessary in the search for truth; and (3) there are no other feasible alternative sources or less intrusive means by which the same evidence can be procured. Additionally, it should be shown that the request for information is not overbroad, oppressive or unreasonable. These criteria overlap those generally applicable to the issuance and enforcement of subpoenas even in the absence of a claim of privilege." (App. A, pp. 51a-52a)

Since the trial judge had not indicated how he had reached his conclusion, Justice Handler observed that a remand was essential to permit supplementing of the record so that a determination could be made as to whether the requisite tests had been met, and concluded as follows:

> "Under these circumstances, the judgments of contempt should be vacated. Criminal contempt proceedings are attended with virtually the same solemnity

* Such cases had been briefed to the Court and were not remarked upon in the majority opinion.

as ordinary criminal actions. *N.J. Dept. of Health* v. *Roselle*, 34 *N.J.* 331 (1961); *In re Ruth M. Buehrer*, 50 *N.J.* 501 (1967). These include notice of the essential elements of the charges and a reasonable opportunity to challenge their sufficiency. *In re Tiene*, 17 *N.J.* 170 (1954). The appellants did not have an adequate opportunity to confront the merits of the enforcement order of June 30, 1978, which constitutes the basis of the contempt proceedings. In the absence of any disclosure by the trial judge as to his specific reasons compelling the *in camera* inspection, there was no viable chance for appellants to defend against the order to enforce on the grounds of privilege and the invalidity of the subpoenas. Since the hearings in both contempt proceedings, that in aid of a litigant as well as the criminal action, were substantially merged, the vice of inadequate notice and opportunity to challenge infects each. I would therefore vacate both contempt judgments." (App. A, p. 55a)

REASONS FOR GRANTING THE WRIT

I

Petitioners Were Convicted of Contempt of Court in a Fashion Which Deprived Them of Due Process of Law as Required by the Fourteenth Amendment to the United States Constitution

Contempt convictions are, as Justice Handler observed, "attended with virtually the same solemnity as ordinary criminal actions." (App. A, p. 55a). Indeed, apart from the fact that in ordinary criminal cases indictments and jury trials are provided, the procedural protections afforded in the two types of cases are all but identical. *See In re Buehrer*, 50 N.J. 501, 515-16, 236 A.2d 592, 600 (1967); *In re Contempt of Carton*, 48 N.J. 9, 22, 222 A.2d 92, 99 (1966). Due process of law was thus fully required in

the criminal contempt proceeding, as it also was in the civil contempt proceeding. *See In re Tiene*, 17 N.J. 170, 180, 110 A.2d 93, 98 (1954).

In these cases, however, as two members of the New Jersey Supreme Court concluded, neither the *Times* nor Farber received anything approaching due process of law.

A. *Retroactive Revision, Modification and Nullification of the New Jersey Shield Law*

As the New Jersey Supreme Court acknowledged, by its explicit terms the shield law affords a journalist "a privilege to refuse to disclose, *in any legal . . . proceeding*" or to *"any court"* the "source . . . from or through whom any information was procured . . . and . . . [a]ny news or information obtained in the course of pursuing his professional activities, whether or not it is disseminated." N.J. Stat. Ann. §2A:84A-21 (West Cum. Supp. 1978-79) (emphasis added)*

There is no ambiguity in this case as to the intent of the shield law or as to its intended scope. The New Jersey Supreme Court itself explicitly concluded that petitioners come within the precise and unequivocal terms of the statute:

> "It is abundantly clear that appellants come fully within the literal language of the enactment. Extended discussion is quite unnecessary. Viewed solely as a matter of statutory construction, appellants are clearly entitled to the protections afforded by the act unless statutory exceptions including waiver are shown to apply." (App. A, p. 12a)

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* The only two exceptions to the applicability of the statute (neither of which applies to the instant case) are expressly limited to: (a) a reporter who intentionally conceals from the source the fact that he is a reporter; and (b) a reporter who is himself an eyewitness to, or participant in, any act involving physical violence or property damage. (*Id.* §2A:84A-21a(h)).

The logical conclusion from the Court's own assessment of the shield law as written is that, at least prior to the opinion at issue here, petitioners were, at the very least, justified in their belief that they were shielded by that statute against forced disclosure to the Court of confidential sources and information.*

By its decision in this case, the New Jersey Supreme Court engrafted upon the shield law two further provisions, both of which alter dramatically the conceded intention of the statute. First, the Court held that the express language of the shield law must yield to the demands of a subpoena served in the context of this criminal trial. In addition, the Court ruled that despite the statute's provision that a journalist may refuse to disclose privileged materials to "any court," an order to produce such materials *in camera* does not violate the terms of that statute.

Thus, despite petitioners' good faith reliance on the clear and precise words of the shield law, despite petitioners' correct assessment as to the intended purport, thrust and coverage of the statute, and despite the failure of the trial court to set forth any interpretation of the statute, or its applicability, the New Jersey Supreme Court has permitted petitioners to be adjudged in contempt and harshly punished for invoking that statute's protection in a manner which, prior to the Court's ruling, petitioners had no reason to believe was impermissible. The

* Indeed, the Attorney General of New Jersey took the position in the New Jersey Supreme Court that:

> ". . . the wording of the New Jersey News Media Privilege would indicate that the court of first impression should determine the applicability of the [privilege], including a lack of waiver, before ordering production, even *in camera*, of all documents or items subpoenaed." (Br. p. 31)

It would surely be difficult to demonstrate a lack of "fair warning" more graphically than in a situation in which the prosecutor shares the defendants' views as to the purport of a statute—and a Court rejects the views of both.

Court not only has narrowed the scope of the intended and explicitly stated protections of the shield law (thus making punishable that which was legitimate behavior at the time petitioners acted), but the Court has applied its determination retroactively in violation of the fundamental tenet of due process that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *see Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

This Court has frequently struck down as unconstitutional penal statutes which were impermissibly vague, *see, e.g., Smith* v. *Goguen*, 415 U.S. 566 (1974); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), particularly where the subject statute "'abut[s] upon sensitive areas of basic First Amendment freedoms,'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976). This Court has recognized, moreover, that "a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964). *See also Marks* v. *United States*, 430 U.S. 188 (1977); *Douglas* v. *Buder*, 412 U.S. 430 (1973); *Rabe* v. *Washington*, 405 U.S. 313 (1972) (*per curiam*).

Thus, in *Bouie*, this Court observed that retroactive application of an unforeseen statutory construction bears the same constitutional infirmity as enforcement of an *ex post facto* law:

> "An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent*, when done, criminal; and punishes such action,' or 'that *aggravates* a *crime*, or makes it *greater* than it was, when com-

mitted.' *Calder* v. *Bull*, 3 Dall. 386, 390. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Cf. *Smith* v. *Cahoon*, 283 U.S. 553, 565." (378 U.S. at 353-54) (footnote omitted).

This Court further observed that there exists:

"a potentially greater deprivation of the right to fair notice in this sort of case where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that question may arise as to its coverage, and that it may be held to cover his contemplated conduct. *When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.* If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at [the statute's] meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, *because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the conduct in question.*" (*Id.* at 352) (emphasis added).

Similarly, in *Rabe* v. *Washington*, 405 U.S. 313 (1972), this Court reversed the conviction of a drive-in theatre manager under a statute which made criminal the knowing display of "obscene" motion pictures. In that case, the state court had not held that the subject motion picture was "obscene" within the terms of the statute, but, rather, that the film was obscene "in 'the *context of its exhibition*'". (405 U.S. at 315) (emphasis in original). Noting that the statute under which petitioner had been convicted did not mention that the location of the exhibition was an element of the offense, the Court held the statute as construed, "impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown." (*Id.* at 315-16)

Here, as in *Rabe*, the statute against which petitioners' conduct must be adjudged makes no mention that the protections to which the New Jersey Court has held they were "clearly entitled" are not available in the context of this —or any—criminal trial when a defendant issues a subpoena, or that the privilege against forced disclosure to "any court" does not include disclosure to a single judge of a court. Here, as in *Rabe*, petitioners' "conviction was . . . affirmed under a statute with a meaning quite different from the one he was charged with violating." (405 U.S. at 315) Petitioners were indeed "lull[ed] . . . into a false sense of security" (*Bouie, supra*, 378 U.S. at 352), having acted without fair warning—or any warning—that, by virtue of a subsequent and unforeseeable construction of the shield law, their contemplated action would be deemed wrongful and subject them to punishment. Any notion of due process surely requires more than this.

B. *Failure to Afford a Hearing*

At all stages in these proceedings, petitioners sought and were denied that most basic of all due process rights: a hearing *prior* to being required to comply with subpoenas they believed violated both the clear language of the New Jersey shield law and the United States Constitution itself. That denial, as noted by Justices Pashman

and Handler, was a clear violation of petitioners' Fourteenth Amendment right to due process of law.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). This Court has thus repeatedly held that the denial of a hearing prior to the deprivation of a protected right is a violation of the due process clause of the Fourteenth Amendment. *See, e.g., Goss* v. *Lopez*, 419 U.S. 565 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

In this case, the New Jersey Supreme Court has acknowledged that just such a hearing was required prior even to an order being entered directing an *in camera* inspection (App. A, pp. 17a-18a). Yet none was ordered in this case and, over the express opposition of the prosecutor in the case,* there was no remand to establish any of the requisite findings upon which the validity of the subpoenas could, even in theory, have been established. Instead, the New Jersey Supreme Court itself made, *ex parte*, a factual determination of the very issues upon which petitioners were seeking a hearing, by simply examining "assertions" set forth in the brief submitted on behalf of Jascalevich—without affording any notice, any opportunity for response, or any cross-examination.** To say the very least, this

* *See supra*, pp. 12-13.

** Had petitioners been afforded an opportunity to respond at a hearing to assertions made by Jascalevich and relied upon by the Court to find the "glaring fact" of an alleged "close working relationship" between Farber and the Prosecutor's office (App. A, (p. 19a) and therefore Jascalevich's supposed need for Farber's notes, they would have shown, *inter alia*, that:

—Farber received Mrs. Kenderes' telephone number from an employee of Riverdell Hospital and *not* from Mrs. Moses (*see* App. A, pp. 22a-23a). Farber has, in fact, testified to that fact at the murder trial of Jascalevich; the Supreme Court did not have such testimony before it, as indeed Judge Arnold did not have it when he issued his Order to Produce;

—Jascalevich has not subpoenaed Lee Henderson, a potential witness whom Jascalevich claims "may very well have information touching upon Dr. Jascalevich's activities, if any, in the laboratory" (App. A, pp. 21a-22a) and whom Farber and the Prosecutor separately have interviewed;

—The only "result" of Farber's investigation which was "made available to the Prosecutor" (*see* App. A, p. 20a), was a single deposition which had been misplaced by that office, and which Jascalevich has.

We do not wish to burden this Court with evidentiary matters not relevant to the issues before it; we cite these examples simply to demonstrate the incomplete and one-sided nature of the "record" adverted to by the New Jersey Supreme Court—a record which could have been rebutted by petitioners if any chance to do so had been provided. As phrased by Justice Pashman, "[t]his amalgam of *post-hoc*, *ex parte*, and newspaper article 'factfinding' is not my idea of what a Shield Law hearing is all about." (App. A, p. 39a). Nor, we add, what due process is all about.

examination by the Supreme Court hardly meets any constitutional test.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice . . . and . . . an opportunity [for the parties] to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The procedure employed by the New Jersey Supreme Court totally deprived petitioners of any right to be heard, let alone to present witnesses and evidence. It is, of course, not enough that there be a hearing, but, as this Court stated in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), it must be "at a meaningful time and in a meaningful manner." The "hearing" employed by the Supreme Court of New Jersey simply was not "meaningful." In its attempt to protect the Sixth Amendment rights of Jascalevich, the New Jersey Supreme Court totally abrogated the due process rights of petitioners.

C. *Failure to Abide by Statutory and Judicial Representations*

Even the circumstances under which Farber was brought to New Jersey and served with criminal process there represents a patent deprivation of due process. The order to show cause which initiated the criminal contempt proceeding was served in New Jersey notwithstanding the express terms of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (codified in New Jersey as N.J. Stat. Ann. §2A: 81-21) and notwithstanding Judge Arnold's certification that Farber would be immune from service of criminal process upon arriving into the State of New Jersey.*

Had it been known that New Jersey would not accord Farber the cloak of immunity granted by the statute and explicitly promised by Judge Arnold's certificate, he would have on that basis contested the New Jersey certificate in the New York proceeding and the New York court would have been required to deny the New Jersey application. *In re Mayers*, 9 Misc.2d 212, 169 N.Y.S.2d 839 (Ct. Gen. Sess. N.Y.Co. 1957).

It should go without saying that when the state has represented by statute or judicial decree that a person will be granted immunity, due process requires that he not be criminally punished after he has acted in reliance on the promised protection, *Raley* v. *Ohio*, 360 U.S. 423, 438-39 (1959). That is precisely what has occurred in this case and it well illustrates the fundamental unfairness of the proceedings from beginning to end.

* This Court, in finding the Uniform Act to be constitutional, emphasized the requirement that "the court which received the certificate is obliged to determine . . . that the laws of the requesting State and States through which the witness must travel grant him immunity from arrest and the service of civil and criminal process," *New York* v. *O'Neill*, 359 U.S. 1, 4 (1959). The one state court which has addressed the possibility that a witness might be criminally convicted while in a state under the Act, has stated that the statute requires the conviction be voided. *Wright* v. *State*, 500 P.2d 582, 588 (Okla. Crim. App. 1972).

II

In Holding That Petitioners Could Not Be Afforded the Full and Intended Protections of the New Jersey Shield Law, the Ruling of the New Jersey Supreme Court Misapprehended the Requirements of the Sixth Amendment

We have previously urged that as a matter of due process of law, petitioners may not be held liable for relying on the plain language—and intended statutory construction—of the New Jersey Shield Law. Beyond that, the ruling of the New Jersey Supreme Court that the Sixth Amendment and its New Jersey counterpart compel the conclusion that the New Jersey Shield Law "must yield" and may "not . . . stand" as written is unsupported by any ruling of this Court and is inconsistent with this Court's ruling in *Branzburg* itself.

At the outset, we emphasize that we do not, of course, maintain that New Jersey was constitutionally required to have adopted its shield law. Nor, in fact, was the New Jersey Supreme Court constitutionally obliged to have interpreted its shield law in any particular way as regards any particular communication. What the New Jersey Supreme Court, however, may not do is precisely what it has done: to nullify large portions, if not all, of its statutory law based upon a misconception of what the Sixth Amendment required it to do.*

* In *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court concluded that:

> "Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of

That this is what has occurred is evident from examination of the ruling of the New Jersey Supreme Court. That Court did not doubt that "appellants come fully within the literal language of the enactments"; or that "[v]iewed solely as a matter of statutory construction, appellants are clearly entitled to the protections afforded by the act unless statutory exceptions including waiver are shown to apply"; or, indeed, that the legislative intent was "to bestow upon the press as broad a shield as possible to protect against forced revelation of confidential source material". (App. A, p. 12a)*

The only basis for the Court's conclusion that the New Jersey shield law does not fully protect petitioners is its conclusion that the Sixth Amendment—and, thus, its otherwise unlitigated and untested New Jersey counterpart—*required* that conclusion. Two cases are cited by the Court as requiring its conclusion—*Washington* v. *Texas*, 388 U.S. 14 (1967) and *United States* v. *Nixon*, 418 U.S. 683 (1974). Both, we submit, were totally misapprehended by the New Jersey Court.

Washington v. *Texas* is correctly cited for the proposition that a Texas statute which barred persons charged or convicted as co-participants in a crime from testifying for their co-defendants was unconstitutional. It simply

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our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. *Perkins* v. *Benguet Consolidated Mining Co., supra.* If the Supreme Court of Ohio 'held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law.' *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U.S. 1, 5 (1950)." (433 U.S. at 568)

Precisely the same may be said here.

*A brief legislative history of the statute is set forth in the dissenting opinion of Justice Handler (App. A, pp. 48a-50a).

cannot be cited for any proposition relevant to this case, since this Court was explicit in observing that:

> "Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges which are based on entirely different considerations from those underlying the common-law disqualifications for interest." (*Id.* at 23 n.21)

Nor does *United States* v. *Nixon* lend support to the ruling, since it makes clear that state or common-law privileges are *not* to be swept away by the mere invocation of the confrontation clause of the Sixth Amendment. As phrased by the Court:

> "Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,
>
> "'that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional, common-law, or statutory privilege, *United States* v. *Bryan*, 339 U.S. [323, 331, (1950)]: *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932) . . . .' *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).
>
> "The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness again himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor

> expansively construed, for they are in derogation of the search for truth." (footnote omitted) (418 U.S. at 709-10)*

Here, of course, we need not and do not ask this Court to "create" a New Jersey shield law or, indeed, to "construe" it at all. What we believe need be done, however, is to advise New Jersey that its law as written and intended is constitutional under the Sixth Amendment.

That this is the case is suggested by the Court's ruling in *Branzburg* itself. There, the Court virtually invited the adoption of federal or state shield law legislation, observing that:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. *There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.* It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, *either qualified or absolute.*" (408 U.S. at 706) (emphasis supplied)

* The *Nixon* ruling is, however, of relevance in another fashion. As Justice Pashman's dissenting opinion demonstrates (App. A. p. 35a) the *Nixon* case is one in which the Special Prosecutor met precisely the threshold burden that counsel to Dr. Jascalevich failed to meet—*e.g.*, a "'lengthy and detailed showing of [the Government's] need for the subpoenaed items and their relevance,'" *citing United States* v. *Mitchell*, 377 F. Supp. 1326, 1328 (D.D.C. 1974), *aff'd sub nom. United States* v. *Nixon*, 418 U.S. 683 (1974).

Since *Branzburg*, a number of additional state shield laws have been adopted, totalling 26 as of this date. Erroneous constructions by state courts of Sixth Amendment requirements so as to nullify state shield laws would not only deprive the press and public of the intended benefit of such laws but would undercut one significant basis of *Branzburg* itself.

Moreover, while it does not rule on the constitutionality of other testimonial privileges, the rationale of the ruling of the New Jersey Supreme Court necessarily threatens a variety of state testimonial privileges sweeping into areas far removed from that involved here. New Jersey, like most other states, has adopted legislation affording testimonial protection in a wide range of situations. They include, *inter alia*, the attorney-client relationship*, N.J. Stat. Ann. §2A:84A-20 (West 1976); that of physician and patient, N.J. Stat. Ann. §2A:84A-22.2 (West 1976); that of priest and penitent, N.J. Stat. Ann. §2A:84A-23 (West 1976); of husband and wife, N.J. Stat. Ann. §2A:84A-22 (West 1976); and that involving informants, N.J. Stat. Ann. §2A:84A-28 (West 1976). With respect to all such privileges, it has always been understood to be inescapable that privileges, by their nature, limit the search for truth in the interest of what is perceived to be a greater societal benefit. Were this not so, there would be no need for a "privilege"—a special pronouncement by the legislature that notwithstanding the social interest in finding out the truth in convicting the guilty and acquitting the innocent, it was conferring on certain persons and professions the

* Under the privilege protecting that relationship, defendant Jascalevich would, we presume, resist the application of the newly adopted Sixth Amendment rule of the New Jersey Supreme Court to weigh whether *his* attorney could be compelled to disclose their privileged conversations—even if a co-defendant insisted that his Sixth Amendment rights required such disclosure.

right to remain silent. New Jersey's renowned Chief Justice Weintraub once observed that:

> "When a privilege is recognized in a witness, injustice may result to the litigants. The injustice may be to the State . . . . The injustice may run to the defendant on trial, for the witness . . . may indeed hold the key to the defendant's innocence." *

Unless *only* shield laws for journalists are destined to be overcome by solicitude for Sixth Amendment values—a result hardly predictable from *Branzburg* and one which would, of necessity, raise still other constitutional questions—the effects of the ruling of the New Jersey Supreme Court will be of significance which transcends the already momentous issues raised in this case. If the Sixth Amendment requires a ruling such as was rendered by the New Jersey Supreme Court, we believe it appropriate that this Court issue such an opinion, lest similar statutes—and, perhaps, other privileges—interfere with the rights of defendants, as well as lull those ostensibly privileged into a false sense of security. If it does not, we believe it imperative that this Court say so, thus enabling this privilege and others like it around the country to benefit the public in the manner deemed appropriate by their draftsmen.

* *State* v. *DeCola*, 33 N.J. 335, 344, 164 A.2d 729, 733-34 (1960).

III

The Ruling of the New Jersey Supreme Court Violates the First Amendment to the United States Constitution by Refusing to Permit Any Case-by-Case Balancing as to What Information Must Be Produced by Journalists and by Holding That Journalists May Be Required to Disclose to the Courts Their Entire Files

Two erroneous First Amendment conclusions are at the heart of the ruling of the New Jersey Supreme Court. The first is that the essence of this Court's ruling in *Branzburg* is that there is *no* First Amendment interest to be weighed against a subpoena served upon the press seeking production of confidential materials. The second is that even though the subpoena was issued by a party who "does not know the extent" of information held by Farber, even though it is not "possible for him to specify all of it with particularity nor to tailor his subpoena to precise materials of which he is ignorant" and even though the subpoena requires the production of *all* notes, *all* memoranda and, in essence, *all* files or data regarding over a hundred witnesses—there was no First Amendment interest to be balanced by the trial judge prior to ordering all the material to be turned over to him.

Both conclusions are, we believe, constitutionally infirm; both suggest the need for plenary review by this Court.

With respect to *Branzburg*, the opinion of the New Jersey Supreme Court simply ignores the pivotal concurring opinion of Mr. Justice Powell which concluded that:

> "[If] the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the [grand jury] investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a

legitimate need of law enforcement, *he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.*" (408 U.S. at 710)

Mr. Justice Powell further emphasized the First Amendment rights of journalists implicit in the *Branzburg* decision in *Zurcher* v. *Stanford Daily*, 98 S.Ct. 1970, 1983-84 (1978) (Powell, J., concurring) by carefully explaining the role which courts must perform in dealing with a journalist's motion to quash on First Amendment grounds. He stated that his concurrence in *Branzburg* noted:

> "that *in considering a motion to quash a subpoena directed to a newsman, the Court should balance the competing values of a free press and the* societal interest in detecting *and prosecuting crime*. . . . The concurring opinion approved recognition of First Amendment concerns within the applicable procedure." (*Id.* at 1984 n.3) (emphasis added).*

* *See also Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., dissenting):

> "[W]e recognized explicitly [in *Branzburg*] that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful: 'Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.' . . . We later reiterated this point by noting that 'news gathering is not without its First Amendment protections. . . .' . . . And I emphasized the limited nature of the *Branzburg* holding in my concurring opinion: 'The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.' . . . In addition to these explicit statements, a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated. See especially *id.*, [408 U.S.] at 700-701." (citations omitted)

No balancing of the competing societal values at issue in the present case was ever undertaken by the New Jersey Court, nor was any recognition given to First Amendment concerns by that Court prior to petitioners' punishment for criminal and civil contempt. Indeed, the Court held that no such balancing was ever required.

> "Thus we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court. Our conclusion that appellants cannot derive the protection they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here." (App. A, p. 9a)

In so ruling, the majority of the New Jersey Supreme Court has deviated from a range of decisions of state supreme courts issued subsequent to *Branzburg* which have applied the balancing test suggested in Mr. Justice Powell's opinion. The most recent of these is the Wisconsin Supreme Court in its ruling in *Zelenka* v. *Wisconsin*, 266 N.W. 2d 279 (Wis. 1978).* Others include *State*

* In *Zelenka* the Wisconsin Supreme Court held that the trial judge had not erred when he refused to require a subpoenaed reporter in a murder trial to disclose confidential source information. The Court reasoned as follows:

> "[T]he decision in *Branzburg* must be construed in light of the concurring opinion of Justice Powell which made a ma-

v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974) and *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974). *See also People* v. *Monroe*, 82 Misc.2d 850, 856, 370 N.Y.S.2d 1007, 1013 (Sup.Ct. Bronx Co. 1975); *People* v. *Marahan*, 81 Misc.2d 637, 368 N.Y.S.2d 685 (Sup. Ct. Kings Co. 1975); *Laughlin* v. *State*, 323 So.2d 691 (Fla. Dist. Ct.App. 1975).

Federal courts have also applied the principles enunciated by Justice Powell and recognized the need for First Amendment protection of confidential materials, unless overcome by a compelling showing of necessity. *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Altemose Construction Co.* v. *Building & Construction Trades Council*, 443 F.Supp. 489

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jority decision possible against four dissenters who recognized a First Amendment privilege of either an absolute or qualified nature. Justice Powell clearly recognizes the existence of a privilege of nondisclosure. He stated that a journalist could claim a privilege, which privilege should then be considered in light of a balancing between freedom of the press and the obligation of citizens to give testimony with respect to criminal conduct. This is comparable to the balancing test adopted by this court in [*State* v.] *Knops*[, 49 Wis.2d 647, 183 N.W.2d 93 (1971),] balancing freedom of the press against a compelling and overriding public interest in the information sought." (266 N.W.2d at 286-87) (emphasis added)

Applying the balancing test mandated in *Branzburg*, the Wisconsin Supreme Court concluded as follows:

> "Applying this test, it is apparent that the trial court did not err in refusing to require [the journalist] to divulge his sources. Other than the mere suggestion that the information might lead to an entrapment defense, the defendant presents no basis for concluding that he was denied a fair trial or that [the journalist's] information could have created a reasonable doubt of any sort. Nor does the public's right to know outweigh the privilege; the information held by [the journalist] was at best tangential to the case. The issue at trial was whether [the defendant] had committed first degree murder. Any information which [the journalist] might have disclosed would have been, at best, only remotely relevant to the issues at hand." (*Id.* at 287)

(E.D. Pa. 1977); *United States* v. *Orsini*, 424 F.Supp. 229 (E.D.N.Y. 1976), *affirmed without opinion*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Gilbert* v. *Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976); *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D. N.Y. 1975); *Democratic National Committee* v. *McCord*, 356 F.Supp. 1394 (D.D.C. 1973).

Nor is the ruling of the New Jersey Supreme Court with respect to the overbreadth of the subpoena any more compatible with relevant authority. In its decision requiring petitioners to turn over virtually the entirety of their files on these matters to the trial court the New Jersey Supreme Court noted only that to deal effectively with an assertion of overbreadth "it is not only appropriate but absolutely necessary for the trial court to inspect *in camera* the subpoenaed items . . . ." (App. A, p. 17a) This view—which would ostensibly require the *Times* to deliver, on demand, *all* of its files to any judge who demands them—is hardly a display of "the necessary sensitivity to freedom of expression" (*Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965)), that this Court has mandated in cases involving First Amendment interests. *E.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

In fact, as this Court observed in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 221 (1951), a ruling vacating a contempt conviction on the ground that the subpoena in question was overbroad in part:

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad." *

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* *See also In re Horowitz*, 482 F.2d 72 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973) (per Friendly, J.) (discussing constitutional implications of overly broad subpoenas); *Margoles* v. *United States*, 402 F.2d 450 (7th Cir. 1968) (upholding district court's decision

In this case, the subpoena at issue is so plainly overbroad that there is no basis at all for permitting the findings of contempt to stand.

In short, the nub of the ruling by the New Jersey Supreme Court as respects the First Amendment is that it has no role in this matter at all and that it is to be given no effect at all. We believe this is a palpably incorrect view, as well as one which is profoundly insensitive to the role played by freedom of expression in our society. It is well worthy of plenary review to correct.

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to quash subpoena *duces tecum* on grounds of overbreadth); *People* v. *Lurie*, 39 Ill.2d 331, 235 N.E.2d 637 (1968) (relying on *Bowman Dairy, supra*, reversing contempt order on grounds that subpoena partially overbroad); *Cross Co.* v. *United Automobile Workers, Local 155*, 377 Mich. 202, 139 N.W.2d 694 (1966) (holding that trial court committed no error in refusing to allow subpoena containing "blanket demand"); *State* v. *Cooper*, 2 N.J. 540, 556, 67 A.2d 298, 306 (1949).

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of the State of New Jersey.

Respectfully submitted,

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September 26, 1978

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws."

Article I(10) of the New Jersey Constitution provides:

"In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

The New Jersey Newspaperman's Privilege Law, N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1978-79), provides in relevant part:

"Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

"a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

"b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."

The New Jersey codification of the Uniform Act to Secure the Attendance of Witnesses from Without a State

in Criminal Proceedings, N.J. Stat. Ann. § 2A:81-21 (West 1976) provides in pertinent part:

"If a person comes into this state in obedience to a summons directing him to attend and testify in this state he shall not, while in this state pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons."

Appendices

APPENDIX A

Opinion of the Supreme Court of New Jersey, September 21, 1978

SUPREME COURT OF NEW JERSEY

No. A-78/79/80 September Term, 1978

On appeal from Appellate Division, Superior Court
and
On certification to Law Division, Superior Court

In the Matter of Myron Farber
and The New York Times Company,
Charged With Contempt,
Defendants-Appellants.

State of New Jersey,
Plaintiff,

vs.

Mario E. Jascalevich, M.D.,
Defendant.

Decided September 21, 1978
Chief Justice Hughes presiding
Opinion by Justice Mountain

Concurring opinion by: Chief Justice Hughes

Dissenting opinions by Justices Pashman and Handler

Check List	*Affirm*	*Reverse*	*Modify*	*Concur*
The Chief Justice	X			(X)
Mr. Justice Mountain	X			
Mr. Justice Sullivan	X			
Mr. Justice Pashman		X		
Mr. Justice Clifford	X			
Mr. Justice Schreiber	X			
Mr. Justice Handler		X		
Totals	5	2		1

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SUPREME COURT OF NEW JERSEY

A-78/79/80 September Term 1978

IN THE MATTER OF MYRON FARBER and THE NEW YORK TIMES COMPANY, CHARGED WITH CONTEMPT OF COURT.

Defendants-Appellants.

STATE OF NEW JERSEY,

Plaintiff,

v.

MARIO E. JASCALEVICH,

Defendant.

Argued September 5, 1978. Decided Sep 21 1978

On certification to the Superior Court, Law Division (A-78/79).

On appeal from the Superior Court, Appellate Division (A-80).

Mr. Floyd Abrams of the New York Bar argued the cause for appellants Myron Farber and The New York Times Company (*Messrs. Winne, Banta, Rizzi and Harrington*, attorneys; *Mr. Peter G. Banta, Mr. Donald A. Klein, and Messrs. Cahill, Gordon and Reindel* of the New York Bar, of counsel; *Mr. Raymond L. Falls, Jr., Mr. Eugene Scheiman, Mr. Kenneth M. Vittor*, and *Ms. Faith Wender*, members of the New York Bar, on the brief).

Mr. Dan Paul of the Florida Bar argued the cause for *amici curiae* The Miami Herald Publishing Co., The Washington Post Company, National Broadcasting

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Company, Inc., Times Mirror Company, The Philadelphia Inquirer, Scripps-Howard Newspapers, United Press-International, Inc., Associated Press, Gannett Co., Inc., Newhouse News Service, Educational Broadcasting Corporation, The Chicago Sun Times, The Courier-Journal and Louisville Times Company, Dow Jones & Company, Inc., The American Society of Newspaper Editors, Radio Television News Directors Association, The National Association of Broadcasters, The Reporters Committee for Freedom of the Press, National Newspaper Association, The Florida Times Union and Jacksonville Journal, The Daily Sentinel, Star-Ledger, The Jersey Journal, CBS, Inc., American Broadcasting Companies, Inc., The Anniston Star, The New Jersey Press Association, Trenton Times, Minneapolis Star and Tribune Company, The Bergen Evening Record Corporation, The Des Moines Register and Tribune Company, Newsweek, The Newspaper Guild and The Newspaper Guild of New York, Local 3 (*Messrs. Mazer, Lesemann and Rupp*, attorneys; *Messrs. Paul & Thomson* of the Florida Bar, of counsel; *Mr. Arthur J. Lesemann*, on the brief).

Mr. John J. Degnan, Attorney General of New Jersey, argued the cause for appellant, *pro se* (*Mr. Degnan*, attorney; *Mr. Degnan* and Deputy Attorneys General *John De Cicco, Edwin H. Stern, Anthony J. Parrillo* and *Ileana Saros*, of counsel and on the brief).

Mr. Raymond A. Brown argued the cause for respondent Mario E. Jascalevich (*Messrs. Brown, Vogelman and Brown*, attorneys; *Mr. Brown* and *Mr. Henry F. Furst* on the brief).

Ms. Edith S. Rose submitted a brief on behalf of *amicus curiae* Association of American Publishers, Inc.; *Messrs. Smith, Cook, Lambert and Miller*, attor-

neys; *Mr. Henry R. Kaufman,* of the New York Bar, of counsel and on the brief).

Mr. Thomas C. Jamieson, Jr., submitted a brief on behalf of *amicus curiae* American Newspaper Publishers Association (*Messrs. Jamieson, McCardell, Moore, Peskin and Spicer,* attorneys; *Messrs. Hanson, O'Brien, Birney & Butler,* of the District of Columbia Bar, of counsel; *Mr. Arthur B. Hanson* and *Mr. Mitchell W. Dale,* members of the District of Columbia Bar, on the brief).

The opinion of the Court was delivered by MOUNTAIN, J.

In these consolidated appeals The New York Times Company and Myron Farber, a reporter employed by the newspaper, challenge judgments entered against them in two related matters—one a proceeding in aid of a litigant (civil contempt), the other for criminal contempt of court. The proceedings were instituted in an ongoing murder trial now in its seventh month, as a result of the appellants' failure to comply with two *subpoenas duces tecum,* directing them to produce certain documents and materials compiled by one or both of these appellants in the course of Farber's investigative reporting of certain allegedly criminal activities. Farber's investigations and reporting are said to have contributed largely to the indictment and prosecution of Dr. Mario E. Jascalevich for murder. Appellants moved unsuccessfully before Judge William J. Arnold, the trial judge in *State* v. *Jascalevich,* to quash the two subpoenas; an order was entered directing that the subpoenaed material be produced for *in camera* inspection by the court. The appellants' applications for a stay of Judge Arnold's order were denied successively by the Appellate Division of the Superior Court, by this Court and by two separate Justices of the Supreme Court of the United States.

Impelled by appellants' persistent refusal to produce the subpoenaed materials for *in camera* inspection, Judge Arnold issued an order returnable before Judge Theodore W. Trautwein, directing appellants to show cause why they should not be deemed in contempt of court. During the subsequent hearing, Judge Trautwein ordered counsel for Jascalevich to apply to Judge Arnold, pursuant to *R.* 1:10-5, for an additional order to show cause, this to be in aid of litigants rights. The order was issued, served and the hearing on the matter consolidated with the hearing on the criminal contempt charge.

Judge Trautwein determined that both appellants had wilfully contemned Judge Arnold's order directing that materials be produced for *in camera* inspection and found them guilty as charged. A fine of $100,000 was imposed on The New York Times and Farber was ordered to serve six months in the Bergen County jail and to pay a fine of $1,000. Additionally, in order to compel production of the materials subpoenaed on behalf of Jascalevich, a fine of $5,000 per day for every day that elapsed until compliance with Judge Arnold's order was imposed upon The Times; Farber was fined $1,000 and sentenced to confinement in the county jail until he complied with the order.

The Appellate Division granted a stay of the contempt orders but denied a stay of the orders for relief of a litigant. Appellants' initial motion for direct certification to this Court was denied. The Attorney General, designated by the Court to prosecute the contempt charges against the appellants, moved before the Appellate Division for a remand in order that the trial court might determine whether the news media privilege, asserted by appellants throughout these proceedings, had been waived. This motion was denied and an appeal was taken to this Court. In response to an inquiry by the Court, the Attorney General filed a letter which contained, *inter alia,* a motion for direct certification.

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The Attorney General's motions for leave to appeal and for direct certification were granted, as was the appellants' motion for direct certification.

I

The First Amendment

Appellants claim a privilege to refrain from revealing information sought by the *subpoenas duces tecum* essentially for the reason that were they to divulge this material, confidential sources of such information would be made public. Were this to occur, they argue, newsgathering and the dissemination of news would be seriously impaired, because much information would never be forthcoming to the news media unless the sources of such information could be entirely certain that their identities would remain secret. The final result, appellants claim, would be a substantial lessening in the supply of available news on a variety of important and sensitive issues, all to the detriment of the public interest. They contend further that this privilege to remain silent with respect to confidential information and the sources of such information emanates from the "free speech" and "free press" clauses of the First Amendment.[1]

In our view the Supreme Court of the United States has clearly rejected this claim and has squarely held that no such First Amendment right exists. In *Branzburg* v. *Hayes*, 408 *U.S.* 665, 33 *L. Ed.* 2d 626 (1972), three news media representatives argued that, for the same reason

[1] The First Amendment of the United States Constitution reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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here advanced, they should not be required to appear and testify before grand juries, and that this privilege to restrain from divulging information, asserted to have been received from confidential sources, derived from the First Amendment. Justice White, noting that there was no common law privilege, stated the issue and gave the Court's answer in the first paragraph of his opinion:

> The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not. [*Branzburg* v. *Hayes, supra*, 408 *U. S.* at 667, 33 *L. Ed.* 2d at 631]

In that case one reporter, from Frankfort, Kentucky, had witnessesd individuals making hashish from marijuana and had made a rather comprehensive survey of the drug scene in Frankfort. He had written an article in the Louisville Courier-Journal describing this illegal activity. Another, a newsman-photographer employed by a New Bedford, Massachusetts television station, had met with members of the Black Panther movement at the time that certain riots and disorders occurred in New Bedford. The material he assembled formed the basis for a television program that followed. The third investigative reporter had met with members of the Black Panthers in northern California and had written an article about the nature and activities of the movement. In each instance there had been a commitment on the part of the media representative that he would not divulge the source of his article or story.

By a vote of 5 to 4 the Supreme Court held that newspaper reporters or other media representatives have no privilege deriving from the First Amendment to refrain from divulging confidential information and the sources

of such information when properly subpoenaed to appear before a grand jury. The three media representatives were directed to appear and testify. The holding was later underscored and applied directly to this case by Justice White in a brief opinion filed in this cause upon the occasion of his denial of a stay sought by these appellants. He said,

> There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had. [*New York Times and Farber* v. *Jascalevich*, A-111 —— *U.S.* ——, —— *L. Ed.* 2d —— (August 1, 1978)]

We pause to point out that despite the holding in *Branzburg*, those who gather and disseminate news are by no means without First Amendment protections. Some of these are referred to by Justice White in the *Branzburg* opinion. *See* 408 *U.S.* at 681-2, 33 *L. Ed.* 2d at 639-40. They include, among others, the right to publish what the press chooses to publish, to refrain from publishing what it chooses to withhold, to seek out news in any legal manner and to refrain from revealing its sources except upon legitimate demand. Demand is not legitimate when the desired information is patently irrelevant to the needs of the inquirer or his needs are not manifestly compelling. Nor will the First Amendment sanction harassment of the press. These do not exhaust the list of such First Amendment protective rights.

The point to be made, however, is that among the many First Amendment protections that may be invoked by the press, there is not to be found the privilege of refusing

to reveal relevant confidential information and its sources to a grand jury which is engaged in the fundamental governmental function of "[f]air and effective law enforcement aimed at providing security for the person and property of the individual . . ." [408 *U. S.* at 690, 33 *L. Ed.* 2d at 644]. The reason this is so is that a majority of the members of the United States Supreme Court have so determined.

Faced with this conclusion, appellants appear to argue that Justice Powell's concurring opinion in *Branzburg* somehow fails to support this result. The argument is without merit. We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White. But even if it did, it would not matter for present purposes. The important and conclusive point is that five members of the Court have all reached the conclusion that the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in so doing he may divulge confidential sources. The particular path that any Justice may have followed becomes unimportant when once it is seen that a majority have reached the same destination.

Thus we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court. Our conclusion that appellants cannot derive the protection they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here. It follows that the obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is

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at least as compelling as the duty to appear before a grand jury.

II

The Shield Law[2]

[2] The term "shield law" is commonly and widely applied to statutes granting newsmen and other media representatives the privilege of declining to reveal confidential sources of information. The New Jersey shield law reads as follows:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
>
> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.
>
> The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.
>
> • • •
>
> Unless a different meaning clearly appears from the context of this act, as used in this act:
>
> a. "News media" means newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.
>
> b. "News" means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.
>
> c. "Newspaper" means a paper that is printed and distributed ordinarily not less frequently than once a week and that contains news, articles of opinion, editorials, features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at a United States post office as second class matter.
>
> d. "Magazine" means a publication containing news which is published and distributed periodically, has a paid circulation and has been entered at a United States post office as second class matter.
>
> e. "News agency" means a commercial organization that collects and supplies news to subscribing newspapers, magazines, periodicals and news broadcasters.
>
> f. "Press association" means an association of newspapers or magazines formed to gather and distribute news to its members.
>
> g. "Wire service" means a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, periodicals or news broadcasters.
>
> h. "In the course of pursuing his professional activities" means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage. [*N. J. S. A.* 2A:84A-21 and 21a]

Appendix A

In *Branzburg* v. *Hayes, supra,* the Court dealt with a newsman's claim of privilege based solely upon the First Amendment. As we have seen, this claim of privilege failed. In *Branzburg* no shield law was involved. Here we have a shield law, said to be as strongly worded as any in the country.

We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained

by reporters and other news media representatives to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey. It is abundantly clear that appellants come fully within the literal language of the enactment. Extended discussion is quite unnecessary. Viewed solely as a matter of statutory construction, appellants are clearly entitled to the protections afforded by the act unless statutory exceptions including waiver are shown to apply. In view of the fundamental basis of our decision today, the question of waiver of privilege under the Shield Law need not be addressed by us.

III

The Sixth Amendment[3] *and its New Jersey Counterpart*[4]

Viewed on its face, considered solely as a reflection of legislative intent to bestow upon the press as broad a shield as possible to protect against forced revelation of con-

[3] The Sixth Amendment of the United States Constitution reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[4] Article 1, ¶10 of the Constitution of the State of New Jersey reads as follows:

> In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

fidential source materials, this legislation is entirely constitutional. Indeed, no one appears to have attacked its facial constitutionality.

It is, however, argued, and argued very strenuously, that if enforced under the facts of this case, the Shield Law violates the Sixth Amendment of the Federal Constitution as well as Article 1, ¶10 of the New Jersey Constitution. These provisions are set forth above. Essentially the argument is this: The Federal and State Constitutions each provide that in all criminal prosecutions the accused shall have the right "to have compulsory process for obtaining witnesses in his favor." Dr. Jascalevich seeks to obtain evidence to use in preparing and presenting his defense in the ongoing criminal trial in which he has been accused of multiple murders. He claims to come within the favor of these constitutional provisions—which he surely does. Finally, when faced with the Shield Law, he invokes the rather elementary but entirely sound proposition that where Constitution and statute collide, the latter must yield. Subject to what is said below, we find this argument unassailable.

The compulsory process clause of the Sixth Amendment has never been elaborately explicated by the Supreme Court. Not until 1967, when it decided *Washington* v. *Texas*, 388 *U. S.* 14, 18 *L. Ed.* 2d 1019 had the clause been directly construed. *Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 *Harv. L. Rev.* 567, 586 (1978). In *Washington* the petitioner sought the reversal of his conviction for murder. A Texas statute at the time provided that persons charged or convicted as co-participants in the same crime could not testify for one another. One Fuller, who had already been convicted of the murder, was prevented from testifying by virtue of the statute. The record indicated that had he testified his testimony would have been favorable to petitioner. The Court reversed the con-

viction on the ground that petitioner's Sixth Amendment right to compulsory process had been denied. At the same time it determined that the compulsory process clause in the Sixth Amendment was binding on state courts by virtue of the due process clause of the Fourteenth Amendment. It will be seen that *Washington* is like the present case in a significant respect. The Texas statute and the Sixth Amendment could not both stand. The latter of course prevailed. So must it be here.

Quite recently, in *United States* v. *Nixon*, 418 *U. S.* 683, 41 *L. Ed.* 2d 1039 (1974), the Court dealt with another compulsory process issue. There the Special Prosecutor, Leon Jaworski, subpoenaed various tape recordings and documents in the possession of President Nixon. The latter claimed an executive privilege and refused to deliver the tapes. The Supreme Court conceded that indeed there was an executive privilege and that although "[n]owhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." 418 *U. S.* at 711, 41 *L. Ed.* 2d at 1065. Despite this conclusion that at least to some extent a president's executive privilege derives from the Constitution, the Court nonetheless concluded that the demands of our criminal justice system required that the privilege must yield.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all

> the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. [*United States* v. *Nixon, supra*, 418 *U. S.* at 709, 41 *L. Ed.* 2d at 1064]

It is important to note that the Supreme Court in this case compelled the production of privileged material—the privilege acknowledged to rest in part upon the Constitution—even though there was no Sixth Amendment compulsion to do so. The Sixth Amendment affords rights to an accused but not to a prosecutor. The compulsion to require the production of the privileged material derived from the necessities of our system of administering criminal justice.

Article 1, ¶ 10 of the Constitution of the State of New Jersey contains, as we have seen, exactly the same language with respect to compulsory process as that found in the Sixth Amendment. There exists no authoritative explication of this constitutional provision. Indeed it has rarely been mentioned in our reported decisions. We interpret it as affording a defendant in a criminal prosecution the right to compel the attendance of witnesses and the production of documents and other material for which he may have, or may believe he has, a legitimate need in preparing or undertaking his defense. It also means that witnesses properly summoned will be required to testify and that material demanded by a properly phrased *subpoena duces tecum* will be forthcoming and available for appropriate examination and use.

Testimonial privileges, whether they derive from common law or from statute, which allow witnesses to withhold evidence seem to conflict with this provision. This conflict may arise in a variety of factual contexts with respect to

different privileges.[5] We confine our consideration here to the single privilege before us—that set forth in the Shield Law. We hold that Article 1, ¶ 10 of our Constitution prevails over this statute, but in recognition of the strongly expressed legislative viewpoint favoring confidentiality, we prescribe the imposition of the safeguards set forth in Point IV below.

IV

Procedural Mechanism

Appellants insist that they are entitled to a full hearing on the issues of relevance, materiality and overbreadth of the subpoena. We agree. The trial court recognized its obligation to conduct such a hearing, but the appellants have aborted that hearing by refusing to submit the material subpoenaed for an *in camera* inspection by the court to assist it in determining the motion to quash. That inspection is no more than a procedural tool, a device to be used to ascertain the relevancy and materiality of that material. Such an *in camera* inspection is not in itself an invasion of the statutory privilege. Rather it is a preliminary step to determine whether, and if so to what extent, the statutory privilege must yield to the defendant's constitutional rights.

Appellant's position is that there must be a full showing and definitive judicial determination of relevance, materiality, absence of less intrusive access, and need, prior to any *in camera* inspection. The obvious objection to such a rule, however, is that it would, in many cases, effectively stultify the judicial criminal process. It might well do so here. The defendant properly recognizes Myron

[5] Compare the informer's privilege where disclosure of identity may sometimes be required. *State* v. *Milligan*, 71 *N. J.* 373 (1976); *State* v. *Oliver*, 50 *N. J.* 39 (1967); *Roviaro* v. *United States*, 353 *U. S.* 53, 1 *L. Ed.* 639 (1957).

Farber as a unique repository of pertinent information. But he does not know the extent of this information nor is it possible for him to specify all of it with particularity, nor to tailor his subpoena to precise materials of which he is ignorant. Well aware of this, Judge Arnold refused to give ultimate rulings with respect to relevance and other preliminary matters until he had examined the material. We think he had no other course. It is not rational to ask a judge to ponder the relevance of the unknown.

The same objection applies with equal force to the contention that the subpoena is overbroad. Appellants do not assert that the subpoena is vague and uncertain, but that the data requested may not be relevant and material. To deal effectively with this assertion it is not only appropriate but absolutely necessary for the trial court to inspect *in camera* the subpoenaed items so that it can make its determinations on the basis of concrete materials rather than in a vacuum. The appellants' reliance upon *State* v. *Cooper*, 2 *N.J.* 540 (1949) is misplaced. There the subpoena was vague and uncertain on its face and violative of *R.R.* 2:5-8. (Now *R.* 1:9-2).

While we agree, then, that appellants should be afforded the hearing they are seeking, one procedural aspect of which calls for their compliance with the order for *in camera* inspection, we are also of the view that they, and those who in the future may be similarly situated, are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for such inspection. Our decision in this regard is not, contrary to the suggestion in some of the briefs filed with us, mandated by the First Amendment; for in addition to ruling generally against the representatives of the press in *Branzburg*, the Court particularly and rather vigorously, rejected the claims there asserted that before going before the grand jury, each of the reporters, at the very least, was entitled to a preliminary hearing to establish a number of

threshold issues. *Branzburg* v. *Hayes, supra,* 408 U.S. at 701-07, 33 *L.Ed.* 2d at 651-55. Rather, our insistence upon such a threshold determination springs from our obligation to give as much effect as possible, within ever-present constitutional limitations, to the very positively expressed legislative intent to protect the confidentiality and secrecy of sources from which the media derive information. To this end such a determination would seem a necessity.

The threshold determination would normally follow the service of a subpoena by a defendant upon a newspaper, a reporter or other representative of the media. The latter foreseeably would respond with a motion to quash. If the status of the movant—newspaper or media representative —were not conceded, then there would follow the taking of proofs leading to a determination that the movant did or did not qualify for the statutory privilege. Assuming qualification, it would then become the obligation of the defense to satisfy the trial judge, by a fair preponderance of the evidence including all reasonable inferences, that there was a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to his defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it.

The manner in which the obligation of the defendant is to be discharged in the proceedings leading to this threshold determination will depend largely upon the facts of the particular case. We wish to make it clear, however, that this opinion is not to be taken as a license for a fishing expedition in every criminal case where there has been investigative reporting, nor as permission for an indiscriminate rummaging through newspaper files.

Although in this case the trial judge did not articulate the findings prescribed above, it is perfectly clear that on

the record before him a conclusion of materiality, relevancy, unavailability of another source, as well as need was quite inescapable. A review of the record in the exercise of our original jurisdiction, *R.* 2:10-5, reveals that the knowledge possessed by the trial judge and the material before him at the time he made his determination to conduct an *in camera* inspection afforded a more than adequate factual basis upon which to rest a conclusion that the threshold prerequisites set forth above were in fact fully met. We deem it quite unnecessary to remand the case in order to have the judge set forth formally what we find to be abundantly clear. We set forth below our reasons for this conclusion.

As of June 30, 1978, the date of the challenged decision to examine the materials *in camera,* Judge Arnold had been trying the case for about 18 weeks. He had dealt with earlier pre-trial motions. His knowledge of the factual background and of the part Farber had played was intimate and pervasive. Perhaps most significant is the trial court's thorough awareness of appellant Farber's close association with the Prosecutor's office since a time preceding the indictment. This glaring fact of their close working relationship may well serve to distinguish this case from the vast majority of others in which defendants seek disclosure from newsmen in the face of the Shield Law. Two and a half months before his June 30th decision, Judge Arnold observed,

> The facts show that Farber has written articles for the *New York Times* about this matter, commencing in January 1976. According to an article printed in the *New York Times* (hereinafter the *Times*) on January 8, 1976, Farber showed Joseph Woodcock, the Bergen County Prosecutor at that time, a deposition not in the State's file and ***provided additional information that convinced the prosecutor to reopen an investigation into some deaths that occurred at***

> *Riverdell Hospital.* [*State* v. *Jascalevich; In the Matter of the Application of Myron Farber and the New York Times Company, re: Sequestration,* 158 *N.J. Super.* 488, 490 (Law Div. 1978), (emphasis added).]

And

> The court has examined the news stories in evidence and they demonstrate exceptional quality, a grasp of intricate scientific knowledge, and a style of a fine journalist. *They, also, demonstrate considerable knowledge of the case before the court and deep involvement by Farber,* showing his attributes as a first-rate investigative reporter. However, if a newspaper reporter assumes the duties of an investigator, he must also assume the responsibilities of an investigator and be treated equally under the law, unless he comes under some exception. [*Id.* at 493-94 (emphasis added).]

In the same vein is a letter before the trial court dated January 14, 1977 from Assistant Prosecutor Moses to Judge Robert A. Matthews, sitting as a Presiding Judge in the Appellate Division, undertaking to explain "how the investigation, from which the [Jascalevich] indictment resulted, came to be reopened." In the course of that explanation it is revealed that sometime in the latter part of 1975 "a reporter for the *New York Times* began an investigation into the 1965-66 deaths and circumstances surrounding them. The results of the *New York Times* inquiry were made available to the Prosecutor. *It was thus determined that there were certain items which were not in the file of the Prosecutor.*" [Emphasis added]

Further support for the determination that there is a reasonable probability that the subpoenaed materials meet the test formulated above appears in the following factual

circumstances pointed to by this defendant and supported by documents and transcripts of testimony found in the appendix filed by the defendant:

1. A principal witness for the State is Dr. Michael Baden, a New York City Medical Examiner, who testified that Farber communicated with him prior to any official communication from the Prosecutor's office. The defendant would have one infer from this that Farber stimulated Baden's research into the causal connection among curare, the death, and Dr. Jascalevich, then turned the results of this joint effort over to the Prosecutor. (Trial testimony elicited from Dr. Baden after June 30th, the date of Judge Arnold's order, is said to furnish further support for this inference.) While no sinister implications need flow from this, it arguably serves to buttress the defense assertion that the driving power behind this prosecution is Farber, and hence such materials, if any, that he may be secreting are reasonably likely to bear on the guilt or innocence of Dr. Jascalevich.

2. Dr. Stanley Harris was a surgeon at the hospital where the criminal activities are said to have occurred. His suspicions are said to have been aroused by the unexplained deaths of some of his patients. Dr. Harris admits having spoken to Farber five times before the New York Times articles appeared and before his reinterview by the Prosecutor's Office in 1976. He is characterized by the criminal defendant as his "principal accuser," and therefore whatever otherwise unavailable information Farber extracted from him would, with reasonable probability, bear upon Dr. Jascalevich's guilt or innocence.

3. Lee Henderson was an attendant at Seton Hall Medical School at a time when, according to one statement allegedly made by Dr. Jascalevich, the latter was performing certain tests on dogs in the School laboratory. The

tests supposedly involved the effects of curare (a drug said to have been administered by the criminal defendant in producing the deaths of the victims). Henderson may very well have information touching upon Dr. Jascalevich's activities, if any, in the laboratory. After considerable effort Farber succeeded in tracking down Henderson in South Carolina. When a Prosecutor's investigator was later able to communicate with Henderson (having presumably been led to him by information furnished by Farber), the witness initially refused to give a statement (later supplied) for fear that it would conflict with a written statement previously furnished to Farber. The criminal defendant wishes to examine this earlier statement.

4. Herman Fuhr was an operating room attendant who opened Dr. Jascalevich's locker at Riverdell Hospital, where curare was allegedly stored. Farber interviewed him. He will not speak to defense representatives.

5. Dr. Charles Umberger was a toxicologist who worked on slides of one of the alleged victims. He gave notes to Farber who did not return them. Some of these notes are missing. Dr. Umberger died in 1977 before the defense could interview him.

6. Barbara Kenderes was a lab technician at the hospital. She gave a statement to a Prosecutor's detective in 1966, which the State either has not furnished or cannot furnish to the defense. She testified before the grand jury in March, 1976. Several days later Mrs. Kenderes received a telephone call on her private, unlisted number from Myron Farber. During the course of the conversation he accused her of hiding something from him. She replied that, indeed, she was. Shortly thereafter, she received a call from Assistant Prosecutor Sybil Moses, who is handling the case. Mrs. Moses told Mrs. Kenderes that Myron

Farber called her and said Mrs. Kenderes was hiding something. Mrs. Moses wanted to know what that was. Mrs. Kenderes replied that it was only the fact that she had appeared before the grand jury, which Mrs. Moses had cautioned her not to speak about. The only person to whom Mrs. Kenderes had given her private phone number in connection with this matter was Mrs. Moses. Again the inference defendant Jascalevich would have us draw is that early on there was complete cooperation and exchange of information between the Prosecutor's Office and Farber, with the resultant likelihood that Farber is now, and for some time has been, in possession of material and relevant information not otherwise obtainable bearing on the guilt or innocence of Dr. Jascalevich.

We hasten to add that we need not, and do not, address (much less determine) the truth or falsity of these assertions. The point to be made is that these are the assertions of the criminal defendant supported by testimonial or documentary proof; and based thereon it is perfectly clear that there was more than enough before Judge Arnold to satisfy the tests formulated above. Of course all of this information detailed above has long been known to appellants. Accordingly we find that preliminary requirements for *in camera* inspection have been met.

We have considered appellants' other contentions as to lack of jurisdiction and the like. So far as they are relevant to the matters herein decided we find them to lack merit.

The judgment of conviction of criminal contempt and that in aid of litigant's rights are affirmed. Stays heretofore entered are vacated effective as of 4:00 p.m., Tuesday, September 26, 1978.

Appendix A

SUPREME COURT OF NEW JERSEY

A-78/79/80 September Term 1978

IN THE MATTER OF MYRON FARBER and THE NEW YORK TIMES COMPANY, CHARGED WITH CONTEMPT,

Defendants-Appellants,

STATE OF NEW JERSEY,

Plaintiff,

v.

MARIO E. JASCALEVICH,

Defendant.

HUGHES, *C.J.*, concurring.

I join in the comprehensive opinion of Justice Mountain and would briefly refer to factors which seem to me particularly reassuring in justification of that opinion. As pointed out, Judge Arnold in his threshold rulings was quite familiar with testimony introduced in a very long trial. As mentioned by Justice Mountain, this record included testimonial reference to the activities of Myron Farber and to the statements of material trial witnesses, which Farber possesses as agent of the respondent The New York Times. These statements, as shown by the trial record, are demonstrably inaccessible to the criminal trial defendant and should obviously be subject to comparison with the present trial testimony of various witnesses who have made such statements.

It would of course have been better practice for the trial judge to have documented references to that testimonial record to demonstrate, at the threshold: (1) probable relevance and materiality, (2) absence of opportunity

Appendix A

for less intrusive access to the material demanded, (3) the status of any Shield Law protection and (4) the substantial reality of a consequent Sixth Amendment right to the evidence on the part of the defendant. The failure to have done so, however, should not be conclusive in the face of respondents' intransigence. Considering that today we have found the threshold requirements to be evident in the record, as doubtless did Judge Arnold as the basis for his rulings, it is clear that respondents have denied to the court *in camera* access to the only factual base upon which any court could intelligently and *finally* have determined those issues.

In this context, then, respondents have not truly been denied a hearing—they have intentionally withheld from the court the only foundation (that is to say, *in camera* consideration such as occurs in equally important Fifth Amendment cases) upon which any sensible final hearing and determination could have been based. In that respect they have aborted, alike, any possible fuller hearing and any possible substantive determination based on such a hearing.

Considered in this way, respondents have in fact had all the hearing to which they are presently entitled—that is to say a full consideration of their claimed Shield Law privilege to the extent that such asserted right may be adjudicated *in vacuo*. Their claim to a final adjudication without an *in camera* scrutiny by the court upon which to base its decision would project the absurd proposition that the press, and not the courts, should be the final arbiter of the constitutional mandate.

Such a conclusion would be discordant with the entire history of constitutional adjudication since the foundation of the Republic. It would be destructive of values upon which our constitutional democracy rests, that is to say, on the premise that the Constitution is supreme over the transitory will of any man, or of any group of men, or

of the Congress itself, or even of a President, or of the press, or of any special interest, no matter how worthy. In the perspective of history, given the need for freedom of the press and religion, of free speech and assemblage and other rights of free people, all such rights are diminished if men may be condemned without the right to fair trial and without compulsory process to effectuate that right. For in the end, this was the constitutional purpose —that all men might be equal before the law—and thus free to seek without restraint those common goals identified by our ancestors—life, liberty and the pursuit of happiness. All these are affronted and endangered intolerably, if fair trial is denied to anyone.

SUPREME COURT OF NEW JERSEY

A-78/79/80 September Term 1978

IN THE MATTER OF MYRON FARBER and THE NEW YORK TIMES COMPANY, CHARGED WITH CONTEMPT OF COURT.

Defendants-Appellants.

STATE OF NEW JERSEY,

Plaintiff,

v.

MARIO E. JASCALEVICH,

Defendant.

PASHMAN, *J.*, dissenting

I respectfully dissent from the Court's affirmance of the judgments of civil and criminal contempt entered below. Subjecting appellants to sanctions for failure to comply with a judicial order prior to an adjudication as to their legal obligation to comply with that order runs counter to the core concept of our legal system—due process of law. This is not a case in which appellants' claims of privilege are frivolous and easily disposed of; quite the contrary, substantial questions are herein presented concerning appellants' rights under both the First Amendment and the New Jersey News Media Privilege Act to refuse to disclose sources and confidential information gathered in the course of appellant-Farber's investigative reporting activities. Since appellants were denied an opportunity to present these claims prior to the imposition against them of coercive and punitive sanctions, the judgments of

contempt must be vacated and the case remanded for a hearing to determine the merits of their objections.

The main question posed by the present case is whether the New York Times Company and Myron Farber may be adjudged to be in civil and criminal contempt for their refusal to comply with an order of the judge presiding over the trial in *State* v. *Jascalevich* to produce certain materials for *in camera* inspection before the merits of various proffered defenses are heard and decided. Other significant questions concern the scope of the New Jersey News Media Privilege Act and the type of hearing that should have been accorded appellants.

My resolution of this controversy makes unnecessary a consideration of appellants' claims that the subpoena is impermissibly overbroad, *see State* v. *Cooper*, 2 *N.J.* 540 (1949), and that the lower court was without jurisdiction to enter contempt judgments against them. Suffice it to say that grave doubts exists as to the manner in which these issues were treated below.

I

Denial of Due Process

The most fundamental tenet of our legal system is that no man can be deprived of life, liberty or property without due process of law. While due process is a flexible concept whose requirements will vary from case to case, there can be no doubt that at a minimum it mandates that deprivations of liberty or property be preceded by an opportunity to be heard. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis* v. *Ordean*, 234 *U.S.* 385, 394 (1914). Where, as here, First Amendment interests are implicated, especially stringent procedural safeguards are required. *See, e.g., Carroll* v. *President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Freedman* v. *Maryland*, 380 *U.S.* 51 (1965); L. Tribe, *American Constitutional Law*, §§12-34 to 12-36 (1978).

At no point prior to the rendition of the contempt judgments were appellants accorded an opportunity to marshall legal arguments against *in camera* production of the subpoenaed materials. Their claims that the subpoena is impermissibly overbroad and that compelled *in camera* disclosure is forbidden by the First Amendment and the New Jersey Shield Law, *N.J.S.A.* 2A:84A-21, were denied consideration both at the motion to quash the subpoena and during contempt proceedings.

The majority's assertion that appellants were indeed accorded a due process hearing prior to *in camera* inspection is simply without foundation in the record. In fact, it directly contradicts the express words of the trial judge. In response to appellants' contentions that *in camera* disclosure was legally impermissible, the judge stated:

> When the items are produced, this Court will give the applicants a full hearing as to the materiality of the subpoena, its scope and its contents.
> The Court will also decide if the items are barred by the Shield Law and any other legitimate defense that may be asserted.
>
> [Appellants' appendix 103a]

In effect, appellants were to be afforded an opportunity to contest the legality of *in camera* disclosure *only after* the materials had been so disclosed. Such a result not only turns logic on its head, but, more importantly, makes a mockery of "due process." *See In re Vornado, Inc.*, 159 *N.J.Super.* 32, 38 (App.Div. 1978), certif. den. N.J. (1978).

Farber has therefore never received the hearing to which he is constitutionally entitled. I find it totally unimaginable that the majority can even consider allowing a man to be sent to jail without a full and orderly hearing at

which to present his defenses. Mr. Farber probably assumed, as did I, that hearings were supposed to be held and findings made *before* a person went to jail and *not afterwards.*

II

New Jersey News Media Privilege

The appellants' claims as to the privileged nature of the subpoenaed materials are clearly cogent under *N.J.S.A.* 2A:84A-21. That statute provides, in pertinent part:

> * * * [A] person * * * connected with, or employed by news media for the purpose of gathering * * * or disseminating news for the general public or on whose behalf news is so gathered * * * or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere
>
> *a.* The source * * * from or through whom any information was procured [;] * * * and
>
> *b.* Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated.

This case is the first major test of New Jersey's new "Shield Law." There is no reason to accord this statute an unfriendly reception in any court of this State. There should be no eagerness to narrow or circumvent it. The Shield Law is not an irritation. It is an act of the Legislature.

This law was passed in the aftermath of the Supreme Court's decision in *Branzburg* v. *Hayes,* 408 *U. S.* 665

(1972). In *Branzburg,* the Court held that the First Amendment will not always prevent forced disclosure of a reporter's confidential sources and information. More specifically, it ruled that the reporters there involved had no privilege under the First Amendment against being compelled, on pain of contempt, to reveal such confidential data to an investigating grand jury. In its view, the resulting infringement upon the reporters' investigating abilities was outweighed by the grand jury's need to have everyman's evidence.

The Court emphasized, however, that state legislatures were not powerless to alter the result reached in *Branzburg.* As Justice White stated:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. *There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.* It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.
>
> [408 *U. S.* at 706; emphasis supplied]

The News Media Privilege Act was New Jersey's response to the Court's invitation. This Act reflects our Legislature's judgment that an uninhibited news media is more important to the proper functioning of our society

than is the ability of either law enforcement agencies, the courts or criminal defendants to gain access to confidential news data.

It cannot be doubted that this legislative judgment rests upon a firm foundation. News media keep the public abreast of goings-on, both public and private, and thus make possible "[e]nlightened choice[s] by an informed citizenry"—"the basic ideal upon which an open society is premised * * * *" *Branzburg* v. *Hayes*, 408 *U. S.* 665, 726 (1972) (Stewart, J., dissenting). Not only does a free press provide people with a wide range of facts and opinion, but, by exposing the actions of public officials, it serves as a check upon governmental error and abuse. *See, e.g., Sheppard* v. *Maxwell*, 384 *U. S.* 333, 350 (1966); *Estes* v. *Texas*, 381 *U. S.* 532, 539 (1965). As such, it is an "incontestable precondition of self-government." *Branzburg, supra*, at 726 (Stewart, J., dissenting). In the words of James Madison:

> * * * A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors must arm themselves with the power which knowledge gives.
>
> [*Letters and Other Writings of James Madison, Fourth President of the United States*, Vol. 3, p. 276 (1865 ed.)]

It was perhaps for this reason that Justice Douglas concluded that "[t]here is no higher function performed under our constitutional regime" than that of reporting the news. *Branzburg, supra*, at 722 (Douglas, J., dissenting).

A reporter's ability to obtain sensitive information depends on his reputation for keeping confidences. Once

breached—that reputation is destroyed. Potential sources of information can no longer rest secure that their identities and confidences will remain free from disclosure.

Realizing that strict confidentiality is essential to the workings of a free press, our Legislature, through the News Media Privilege Act, has granted reporters an immunity from disclosure which is both absolute and comprehensive. *Any* person connected with *any* news media for the purpose of gathering or disseminating news is granted the privilege of refusing to disclose both the source of and any information acquired in *any* legal or quasi-legal proceeding or before *any* investigative body.

Courts are thus given no discretion to determine on a case-by-case basis whether the societal importance of a free and robust press is "outweighed" by other assertedly compelling interests. The Legislature has done the weighing and balancing and has determined that in every case the right to non-disclosure is paramount. If a reporter falls within the ambit of the statute, he has a privilege of non-disclosure.

This privilege exists not only with respect to public disclosures; it encompasses revelations to any legal or quasi-legal body, including "any court." Even forced *in camera* disclosures are thus prohibited. Indeed, any other conclusion would subvert the policies underlying the statute. As Justice Marshall noted, denying a stay in this case:

> Many potential criminal informants * * * might well refuse to provide information to a reporter if they knew that a judge could examine the reporter's notes upon the request of a defendant.
>
> [*U.S.L.W.* (July 12, 1978)]

Further, the specter of forced *in camera* disclosure may, in the words of Justice Douglas, "cause editors and critics

to write with more restrained pens." *Branzburg* v. *Hayes, supra* at 721 (1972) (Douglas, J., dissenting).

The majority intimates that a reporter may lose the protection of the Shield Law if he can also be deemed an "investigator." See *ante* at (slip opinion at 27). All good reporting must be investigative. If reporting is to be imaginative and understandable, the facts and leads must be searched out. Such resourceful, probing journalism first exposed most of the serious governmental scandals. The process helps people learn what they need to know. To hamper it is to hamper ourselves. To hold therefore that the Shield Law is not applicable to a reporter who is also an investigator is to hold that the Shield Law will never be applicable.[1]

Branzburg makes clear that the Shield Law is a permissible exercise of legislative authority. As the product of a co-equal branch of government, it must be respected by our Courts.

Appellants' position that the Media Privilege Act prohibits forced *in camera* disclosure of confidential data is thus meritorious. Since this is so, it is unnecessary to pass upon their claims that the First Amendment also protects them from such forced disclosure.

III

Necessity for Hearing

Jascalevich asserts that the materials subpoenaed in the present case are relevant to his defense, and hence non-disclosure will deprive him of his Fifth and Sixth

[1] Counsel for Jascalevich intimates that a reporter who informs the public by authoring a book is somehow less deserving of Shield Law protection than one who articulates his findings in a newspaper. Publishing journalistic books for money is no less an illustrious way to perform the function of the press than is writing newspaper articles for a salary.

Amendment rights to a fair trial. It is of course axiomatic that a statute cannot be applied so as to abridge an individual's constitutional rights. However, if the materials are ordered turned over for *in camera* inspection in order that a determination be made as to their relevance to Jascalevich's defense, appellants' statutory privilege of non-disclosure will be eviscerated.

How to deal with this state of affairs? It is submitted that an almost identical situation was faced by the Supreme Court in *United States* v. *Nixon,* 418 *U.S.* 683 (1974), and that the Court's solution to the problem in that case should serve as a guide to the case at hand. In *Nixon,* the production of subpoenaed presidential material was resisted on grounds of "executive privilege." Disclosure of the data was sought by presidential aides who were criminal defendants as well as by the prosecutors. In the course of its opinion, the Court noted that before the "weighty" interest in confidentiality was undermined by even *in camera* disclosure, those desirous of obtaining the information were required to make a threshold showing as to the relevance, materiality and necessity of the data to the conduct of the trial. In that case, the Special Prosecutor had met this threshold burden. In the words of the lower court, he had made "a lengthy and detailed showing of [the Government's] need for the subpoenaed items and their relevance." *United States* v. *Mitchell,* 377 *F. Supp.* 1326, 1328 aff'd *sub nom United States* v. *Nixon,* 418 *U.S.* 683 (1974). *See also Brown* v. *Commonwealth,* 214 *Va.* 755, 204 *S.E.* 2d 429 (S.Ct.), *cert. den.* 419 *U.S.* 966 (1974); *State* v. *St. Peter,* 132 *Vt.* 266, 315 *A.*2d 254 (S.Ct. 1974).

The need to impose such a threshold burden upon a criminal defendant is at once manifest. Absent such a requirement, nothing prevents any person accused of a crime from embarking upon "fishing expeditions" into a news media's files. Such rummaging of a newspaper's records

cannot be permitted. *See Brown* v. *Comonwealth, supra; State* v. *St. Peter, supra.*

Case law demonstrates that a criminal defendant's Fifth and Sixth Amendment rights will be undermined only if subpoenaed data are relevant, material *and* necessary to the defense. If the information is irrelevant *or* immaterial *or* unnecessary to Jascalevich's defense, *or* if alternate sources of this information exist, then non-production will not impair his constitutional rights; hence, disclosure cannot be mandated. *See Brown* v. *Commonwealth, supra; State* v. *St. Peter, supra.*

This cause must therefore be remanded for a hearing prior to a decision regarding appellants' obligation to disclose the subpoenaed materials. At this hearing, evidence can be adduced relating to: (1) the applicability of the Media Privilege to the information sought to be obtained by Dr. Jascalevich; (2) the existence of a waiver of that privilege; and (3) the relevance, materiality and necessity of the subpoenaed data to Jascalevich's defense. The latter inquiry will, of course, encompass a determination as to the existence of alternate sources of information. Since the Media Privilege Act prohibits even compelled *in camera* disclosure, such disclosure should not be ordered, as in *Nixon,* unless and until Jascalevich has made a threshold showing that the materials are relevant, material and necessary.

The majority suggests that a hearing can be dispensed with, or that its outcome will be foreordained, in every case in which a reporter possesses "considerable knowledge of [a criminal] case." See *ante* at (slip opinion at 27). Such a conclusion nullifies the provisions of the Media Privilege Act. In effect, the majority has ruled that Shield Law protection will be withdrawn from reporters who perform their jobs competently—that is, those who gain "considerable knowledge" concerning a

criminal case. A hearing as to relevance, materiality, and necessity must be conducted in *all* cases in which the privilege is invoked. Compelled *in camera* disclosure must be prohibited unless and until the defendant has met his threshold burden in accordance with the procedures to be discussed below.

Those procedures—which will apply to all who may be similarly situated—should be as follows:

(1) The person claiming the privilege should be required to make a *prima facie* showing that he is a newsperson and that he obtained the subpoenaed materials in the course of his newsgathering duties. This is subject to rebuttal by Dr. Jascalevich; Jascalevich may also show waiver of the privilege.

(2) If the judge finds that the privilege is arguably applicable, then the burden should shift to Dr. Jascalevich to make a threshold showing (a) that the data are relevant, material and necessary to his defense and (b) that no less intrusive means of gaining the information are extant. This showing must demonstrate what the materials are expected to show with sufficient specificity to allow the trial judge to make an independent judgment thereon. Appellants Farber and the Times should then be given an opportunity to rebut Jascalevich's showing. If the judge finds that any or all of the requested data are irrelevant, unnecessary or immaterial, he must quash the subpoena as to such materials.

(3) If the judge finds that Jascalevich has made a threshold showing with respect to any of the subpoenaed materials, he should order these materials—and only these materials—produced for *in camera* inspection. In order that appellants' rights be infringed to the least extent possible, appellants should be permitted to delete the names

of informants and any other identificational indicia during this stage of the proceedings.

(4) After the judge has inspected the material, he should make a determination as to whether any portion is relevant, material and necessary to Dr. Jascalevich's defense. He must also decide whether that material will probably be admissible at trial. *United States* v. *Nixon, supra,* at 714. If these criteria are satisfied, then that portion of the material should be released to Jascalevich. All other material must be returned to appellants. Counsel should have an opportunity to be heard.

(5) The judge must make findings of fact and conclusions of law at each stage of the proceedings.

(6) Either party may seek leave to appeal the judge's decision as to *in camera* inspection or release of information after inspection.

Throughout all stages of the proceeding, the judge should constantly keep in mind the strong presumption against disclosure of protected materials. All doubts concerning disclosure should be resolved in favor of non-disclosure.

I am mindful that this inquiry will take place in the context of an ongoing murder trial and that delays are undesirable. Therefore, I do not expect that this hearing will be drawn out. The trial judge possesses sufficient powers to ensure that the hearing proceeds expeditiously.

It must be emphasized that such a hearing is to be conducted only in cases in which a criminal defendant asserts that privileged data are necessary to his defense. In all other situations in which the News Media privilege is invoked, no constitutional concerns will exist. Hence, given the absolute nature of the statutory privilege, compelled disclosure is forbidden.

No such hearing was held prior to the trial judge's order that the subpoenaed materials be produced for *in camera*

inspection. The majority admits as much. See *ante* at (slip opinion at 26). However, instead of remanding the cause, it invokes its original jurisdiction under *R.* 2:10-5 in a "patchwork" attempt to make findings of fact essential to its disposition of this controversy. In view of the importance of the questions presented and the state of the record below, this venture into the province of the trial judge is both unwarranted and unwise. An appellate court should rarely engage in original factfinding; its distance from the proceedings below makes factual judgments very difficult. It is not rational to expect that a Court so removed will adequately perform this function. When the issues are of constitutional magnitude, such an undertaking is especially undesirable. A decision whose impact will be felt by many persons in many places should not be the product of an incomplete record.

Even were I to agree that original factfinding is appropriate, I could not sanction the manner in which the majority has found its "facts." The trial judge's conclusions upon which the majority places so much reliance were not the product of a hearing below in which appellants were allowed to participate. Rather, these conclusions derive solely from the judge's examination of a handful of newspaper articles. *See State* v. *Jascalevich,* 158 *N.J. Super.* 488, 493 (Law Div. 1978). The "further support" upon which the majority bases its findings of fact, see *ante* at (slip opinion at 28-31), does not even derive from the trial judge. Instead, the majority's "findings" are taken substantially verbatim from conclusory allegations contained in the statement of facts section of the brief for Dr. Jascalevich. This amalgam of *post-hoc, ex parte,* and newspaper article "factfinding" is not my idea of what a Shield Law hearing is all about.

Appendix A

IV

Conclusion

I believe the majority holding results in the Shield Law leaving a reporter unshielded and the free press not-so-free. Justice Frankfurter once noted that any court can properly decide a case if only a single principle is in controversy. The difficulty is that this case entails more than one so-called principle. It is therefore a hard case that is destined to make bad law. The victims will be the press, the courts and the public interest.

Appellants were never accorded a Shield Law hearing prior to the imposition against them of contempt sanctions. Indeed, they were not even given an opportunity to argue that such a hearing should be held. Instead, they were told that a hearing would be forthcoming only *after* the material had been turned over for *in camera* inspection. The majority's attempt to compensate for these procedural infirmities by engaging in *ad hoc* factfinding is "too little, too late."

It did not have to happen this way. This constitutional confrontation should have been avoided by granting a fair hearing to Farber and the New York Times under the guidelines mandated above. If the ultimate evidential test had been met by Dr. Jascalevich in accordance with those guidelines, Mr. Farber would have had to comply with the trial court order for *in camera* inspection. No one is above the law.

Since appellants were denied "an opportunity to be heard" prior to the imposition of sanctions against them, the judgments below must be vacated.

Appendix A

SUPREME COURT OF NEW JERSEY

A-78/79/80 September Term 1978

IN THE MATTER OF MYRON FARBER
and THE NEW YORK TIMES COMPANY,
CHARGED WITH CONTEMPT.

Defendants-Appellants.

STATE OF NEW JERSEY,

Plaintiff,

v.

MARIO E. JASCALEVICH,

Defendant.

HANDLER, J., dissenting

This appeal poses significant and novel issues the resolution of which will endure long after the underlying, highly publicized criminal case has become history. We are required on the appellate level to determine in the context of an ongoing criminal prosecution, now in its seventh month of continuous trial, whether judgments for contempt and the imposition of civil and punitive sanctions were properly visited upon a newspaper and its reporter for their refusal to obey subpoenas requiring that they turn over to the trial court for its *in camera* inspection information related to the case but generated in the course of news gathering and news publication. This Court now rules that the subpoenas *duces tecum* to produce the contested material for the trial judge's *in camera* inspection were enforceable and that the refusal of the reporter and the newspaper to comply with the trial court's compulsive

turn-over order properly subjected them to civil and punitive sanctions for contempt, this notwithstanding their claim that they had no adequate opportunity to demonstrate the invalidity of the subponeas and applicability of a newsman's privilege.

Because I am in substantial accord with much of the reasoning of the Court, it is with misgivings that I voice a dissent. I subscribe to the view that the newsman's privilege is not predicated on the First Amendment and that under the New Jersey Media Privilege Law, *N.J.S.A.* 2A:84A-21, it is not absolute and unqualified; the privilege must yield in appropriate circumstances to a defendant's constitutional right to material evidence in a criminal trial. Further, I agree generally that *in camera* inspection of private or confidential matter by a court may be necessary on a requisite showing in a given case to settle a legal tug of war for the information. I would, however, reach a different result and order a remand in this case in light of the inadequacy of the present record to justify the judgments of contempt. I would do so because of the strength of the newsman's privilege under the New Jersey shield law and the rigorous standards which ought to be applied in determining whether *in camera* inspection of contested information is appropriate in the face of a claim based on that privilege.

I

I agree with the Court that the appellants do not have a privilege founded upon the freedom of press clause of the First Amendment to the United States Constitution. The First Amendment does not stand as a bar to the issuance of a subpoena to a newsman to produce information material to the defense of a criminal case. The United States Supreme Court in *Branzburg* v. *Hayes*, 408 *U.S.* 665, 92 *S.Ct.* 2646, 33 *L.Ed.*2d 626 (1972), effectively so decided:

> * * * We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. * * * On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.
>
> [408 *U.S.* at 690, 92 *S.Ct.* at 2661, 33 *L.Ed.* 2d at 644-645; footnote omitted]*

See also, *Houchins* v. *KQED*, —— *U.S.* ——, 98 *S.Ct.* ——, 57 *L.Ed.*2d 553 (1978); *Zurcher* v. *Stanford Daily*, —— *U.S.* ——, 98 *S.Ct.* ——, 56 *L.Ed.*2d 525 (1978); *Pell* v. *Procunier*, 417 *U.S.* 817, 94 *S.Ct.* 2800, 41 *L.Ed.*2d 495 (1974); *Zemel* v. *Rusk*, 381 *U.S.* 1, 85 *S.Ct.* 1271, 14 *L.Ed.*2d 179, reh. den. 382 *U.S.* 873, 86 *S.Ct.* 17, 15 *L.Ed.*2d 114 (1965); *United States* v. *Liddy*, 354 *F.Supp.* 208 (D.D.C.

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* This holding was underscored by Justice White, the author of the majority opinion in *Branzburg*, who stated in the course of this litigation on an application for a stay of the order for civil sanctions:

> There is no present authority in this Court either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had. (Citations omitted) [*New York Times Co.* v. *Jascalevich*, A-111, 47 *U.S.L.W.* 3066, (August 1, 1978)].

1972); *In re Bridge,* 120 *N.J.Super.* 460 (App. Div.), certif. den. 62 *N.J.* 80 (1972), *cert.* den. 410 *U.S.* 991, 93 *S.Ct.* 1500, 36 *L.Ed.*2d 189 (1973); Annot., "Privilege of Newspaper or Magazine and Persons Connected Therewith Not to Disclose Communications to or Information Acquired by Such a Person", 7 *A.L.R.*3d 591 (1966).

It cannot be overemphasized that despite the absence in the First Amendment of any absolute privilege in favor of a newsman to resist claims for his information in the context of a criminal proceeding, the Amendment does embody constitutional values which are necessarily incidental to a free press in our democratic society. *Nebraska Press Association* v. *Stuart,* 427 *U.S.* 539, 96 *S.Ct.* 2791, 49 *L.Ed.*2d 683 (1976); *Branzburg* v. *Hayes, supra,* 408 *U.S.* at 681, 92 *S.Ct.* at 2656, 33 *L.Ed.*2d at 639; *New York Times Co.* v. *United States,* 403 *U.S.* 713, 91 *S.Ct.* 2140, 29 *L.Ed.*2d 822 (1971); *Curtis Publishing Co.* v. *Butts,* 388 *U.S.* 130, 87 *S.Ct.* 1975, 18 *L.Ed.*2d 1094, reh. den. 389 *U.S.* 889, 88 *S.Ct.* 11, 13, 19 *L.Ed.*2d 197, 198 (1967); *New York Times Co.* v. *Sullivan,* 376 *U.S.* 254, 84 *S.Ct.* 710, 11 *L.Ed.*2d 686 (1964); *State* v. *Allen,* 73 *N.J.* 132 (1977). Thus, while Justice White in *Branzburg* eschewed a balancing test to determine whether there was a privilege to refuse to disclose information (408 *U.S.* at 701-706, 92 *S.Ct.* at 2666-2669, 33 *L.Ed.*2d at 651-654), he nevertheless made it clear that the subject matter of the testimony and the relevancy of any material sought by a subpoena are legitimate questions to be raised and weighed:

> Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand Juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.
>
> [408 *U.S.* at 707-708, 92 *S.Ct.* at 2670, 33 *L.Ed.*2d at 655; footnote omitted].

Justice Powell elaborated on that aspect of the majority decision in a concurring opinion:

> As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.
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> [408 *U.S.* at 709-710, 92 *S.Ct.* at 2671, 33 *L.Ed.*2d at 656; footnote omitted].

It is, I believe, in necessary recognition of the First Amendment concern for the unfettered functioning of the news media in a free and democratic society that many courts have espoused the "balancing" approach articulated by Justice Powell. In *Brown* v. *Commonwealth*, 214 *Va.* 755, 204 *S.E.*2d 429 (Sup. Ct.), *cert.* den. 419 *U.S.* 966, 95 *S.Ct.* 229, 42 *L.Ed.*2d 182 (1974), the Virginia Supreme Court, relying on *Branzburg*, held that the reporter had a privilege "related to the First Amendment" to retain the confidentiality of his sources; since that privilege, however, was not a *right* guaranteed by the First Amendment it could be subordinated but

> * * * only when the defendant's need is essential to a fair trial. Whether the need is essential to due process must be determined from the facts and circumstances in each case. We are of the opinion that when there are reasonable grounds to believe that information in the possession of a newsman is material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached, the defendant's need to acquire such information is essential to a fair trial; when such information is not otherwise available, the defendant has a due process right to compel disclosure of such information and the identity of the source; and any privilege of confidentiality claimed by the newsman must, upon pain of contempt yield to that right.
>
> [204 *S.E.* 2d at 43].

See also, *Farr* v. *Pitchess*, 522 *F.*2d 464 (9 Cir. 1975), *cert.* den. 427 *U.S.* 912, 96 *S.Ct.* 3200, 49 *L.Ed.*2d 1203 (1976); *State* v. *St. Peter*, 132 *Vt.* 266, 315 *A.*2d 254 (Sup. Ct. 1974); *cf. United States* v. *Liddy*, *supra*.

These decisions take *Branzburg* perhaps further than justified by a flat reading of either its majority or concurring opinion. They nevertheless show, as does *Branzburg*, that the reporter's conduct in obtaining and recounting news is a matter of constitutional consideration. A newsman's interest in the gathering of news is an indispensable component in its dissemination and a vital incident to freedom of the press. See, *State* v. *Allen*, *supra*, 73 *N.J.* at 170-171 (Schreiber, J., concurring). Also *New York Times* v. *Sullivan*, *supra*, 376 *U.S.* at 270, 84 *S.Ct.* at 720-721, 11 *L.Ed.* 2d at 700-701; *Associated Press* v. *United States*, 326 *U.S.* 1, 20, 65 *S.Ct.* 1416, 1424-1425, 89 *L.Ed.* 2013, 2030 (1945); *Id.* 326 *U.S.* at 28-29, 65 *S.Ct.* at 1428-1429, 89 *L.Ed.* at 2034-2035 (Frankfurter, J., concurring); *Grosjean* v. *American Press Co.*, 297 *U.S.* 233, 250, 56 *S.Ct.* 444, 449, 80 *L.Ed.* 660, 668-669 (1936). See also, *Saxbe* v. *Washington Post*, 417 *U.S.* 843, 862-863, 94 *S.Ct.* 2811, 2821, 41 *L.Ed.*2d 514, 526-527 (1974) (Powell, J., dissenting). That interest is therefore entitled to protection. In this perspective the reporter stands apart from the ordinary citizen, and although he is not thereby shed of the burdens of citizenship and must respond as any citizen to legal process, he should not needlessly be hobbled in the pursuit and presentation of news. Constraints upon the news media should therefore be tolerated only when they are essential in the good faith discharge of legitimate governmental objectives, or when clearly required for the vindication of individual constitutional rights. We are here confronted with such a case and it is in this framework that the fundamental, contending claims of the principles should be assessed.

II

The Supreme Court in *Branzburg* made it clear that states have complete freedom "within First Amendment limits, to fashion their own standards as to a newsman's

privilege, either qualified or absolute." 408 *U.S.* at 706, 92 *S.Ct.* at 2669, 33 *L.Ed.*2d at 654.

Appellants contend vigorously that the New Jersey Legislature by enacting *L.* 1977, *c.* 253 fashioned an absolute privilege and thereby obviated any requirement for balancing or weighing its application against a claim for material information even in a criminal proceeding. In advancing this argument, appellants build upon the Attorney General's assertion that the present statutory privilege reflects "a purposeful legislative intention and State policy to go beyond the requirements of the Federal and State Constitutions * * * and to protect the press and representatives thereof from any disclosure, even to the court * * *." They conculde that the "law itself strikes the balance in favor of a privilege, in *all* non-waived situations, for a journalist 'to refuse to disclose * * * to (sic: in) any court' [*N.J.S.A.* 2A:84A-21; *Evid. R.* 27] his sources or information."

While the statutory language by its literal, facial terms appends no qualifications to the privilege for newsmen to withhold information, it is difficult to attribute to the Legislature an intent to create an absolute privilege. When enacted it was thoroughly established in this jurisdiction that statutory privileges obstruct truth and ought to be construed restrictively, *In re Selser,* 15 *N.J.* 393, 405-407 (1954); *In re Richardson,* 31 *N.J.* 391, 396-397 (1960); *Hansen* v. *Janitschek,* 31 *N.J.* 545 (1960) rev'g on dissenting opinion of Conford, J., 57 *N.J.Super.* 418, 433 (App. Div. 1959); *State* v. *Jamison,* 64 *N.J.* 363, 375 (1974); *L.J.* v. *J.B.,* 150 *N.J.Super.* 373, 378-380 (App. Div. 1971); *Metalsalts Corp.* v. *Weiss,* 76 *N.J.Super.* 291, 297 (Ch. Div. 1962), and "in sensible accommodation to the aim of a just result", *State* v. *Briley,* 53 *N.J.* 498, 506 (1969); *In re Murtha,* 115 *N.J.Super.* 380, 385-386 (App. Div. 1971); *State* v. *Roma,* 140 *N.J.Super.* 582, 589 (Law Div.), 143

N.J.Super. 504 (Law Div. 1976) (supplemental opinion); see *D.* v. *D.,* 108 *N.J.Super.* 149 (Ch. Div. 1969). It was also axiomatic in our law that no claimant of a privilege can be the final judge of his own claim, a rule recognized in innumerable contexts *In re Addonizio,* 53 *N.J.* 107, 116-117 (1968); *In re Boyd,* 36 *N.J.* 285, 286-287 (1962); *In re Boiardo,* 34 *N.J.* 599, 602 (1961); *State* v. *DeCola,* 33 *N.J.* 335, 350 (1960); *In re Selser, supra,* at 404-405; *State* v. *Toscano,* 13 *N.J.* 418, 423 (1953); *In re Pillo,* 11 *N.J.* 8, 19-20 (1952); *In re Ippolito,* 145 *N.J.Super.* 262, 266-267 (App. Div. 1976); *Zucker* v. *Silverstein,* 134 *N.J.Super.* 39, 53 (App. Div. 1975); *State* v. *Craig,* 107 *N.J.Super.* 196, 198-199 (App. Div. 1969). Moreover, restrictive evidentiary rules ordinarily must yield to the fundamental rights of a defendant to call and confront witnesses, such as invoked in this very case. See *Davis* v. *Alaska,* 415 *U.S.* 308, 315-320, 94 *S.Ct.* 1105, 1110-1112, 39 *L.Ed.*2d 347, 353-356 (1974); *Chambers* v. *Mississippi,* 410 *U.S.* 284, 294-302, 93 *S.Ct.* 1038, 1045-1049, 35 *L.Ed.*2d 297, 308-313 (1973); *Washington* v. *Texas,* 388 *U.S.* 14, 17-19, 87 *S.Ct.* 1920, 1922-1923, 18 *L.Ed.*2d 1019, 1022-1023 (1967); *Roviaro* v. *United States,* 353 *U.S.* 53, 60-61, 77 *S.Ct.* 623, 628, 1 *L.Ed.* 2d 639, 645 (1957); *State* v. *Briley, supra; State* v. *Roma, supra,* 140 *N.J.Super.* at 587-592.

I can therefore agree with the Court that the privilege under the New Jersey shield law is not absolute. It would be a mistake, however, to impute to the Legislature an intent in creating the privilege to furnish only middling protection for the confidentiality of the newsman's work. Rather it seems clear that short of making the privilege absolute, the Legislature sought to establish the strongest possible protection for the newsman and the news media. This is evinced not only by the clear and direct terms of the statute, *N.J.S.A.* 2A:84A-21, which the Court has noted is one of the most strongly expressed in the country.

It is demonstrated by the legislative and judicial evolution of the privilege. That has been a history starting at a point when there was no privilege at all, *In re Grunow*, 84 *N.J.L.* 235 (Sup. Ct. 1913), through sequential legislation creating and expanding the protection afforded the news media and the newsman. Compare *L.* 1933, *c.* 167 (protecting "source" of any information) with *L.* 1960, *c.* 52, § 21 (protecting "source, author, means, agency or person from • • • whom information • • • was procured • • • ") and *L.* 1977, *c.* 253, *N.J.S.A.* 2A:84-21 (protecting "any news or information obtained in the course of [a reporter's] professional activities whether or not it is disseminated"). The most recent amendment, the current shield law, *L.* 1977, *c.* 253, was a direct answer to *In re Bridge, supra*, and *Branzburg*, which allowed grand jury access to a reporter's material, revealing a purpose on the part of the Legislature to accord the broadest protection for the news media and reporters.

This legislative and judicial course highlights the significant public policy embodied in the statutory newspaperman's privilege. It seems to me that the majority of this Court does not give full weight to this public policy and, perhaps for that reason, minimizes the serious impact which an *in camera* inspection, with all its protective accoutrements, has upon the newsman's privilege.

Even though courts have approved the use of *in camera* inspection when a claim of privilege is asserted, at best it is a temporizing solution borne of a paradox—the need to see evidence in order to determine whether the evidence can be seen. The dilemma was aptly perceived by Justice Brennan (then of this Court) in *In re Pillo, supra* at 20, drawing from Judge Learned Hand in *United States* v. *Weisman*, 111 *F.*2d 260, 262 (2 Cir. 1940): "The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege, and at times it permits suppression of competent evidence, nothing better is available." Also, *United States* v. *Melchor Moreno*, 536 *F.*2d 1042 (5 Cir. 1976); *In re U.S. Hoffman Can Corp.*, 373 *F.*2d 622 (3 Cir. 1967). It must be stressed nevertheless that the *in camera* inspection is in fact an incursion into confidentiality. *Cf. State* v. *Milligan*, 71 *N.J.* 373, 393 n. 12 (1976); *State* v. *Oliver*, 50 *N.J.* 39 (1967). We cannot assume that such a loss of confidentiality, even at the hands of judges, does not obtrude upon the freedom of the press which the privilege is designed to secure. *New York Times Co.* v. *Jascalevich*, A-38, 47 *U.S.L.W.* 3013 (July 12, 1978, Marshall, *J.*, denying reapplication for stay); see Murasky, "The Journalist's Privilege: *Branzburg* and Its Aftermath", 52 *Tex. L. Rev.* 820, 857-866 (1974).

While the assertion of privilege may not defeat a need for evidence, at least for an *in camera* inspection, and especially when requested to satisfy a defendant's constitutional right in a criminal trial, the presence of the privilege adds measurably to the difficulty in justifying such disclosure. *Cf. United States* v. *Mitchell*, 377 *F. Supp.* 1326, aff'd *sub nom. United States* v. *Nixon*, 418 *U.S.* 683, 94 *S.Ct.* 3090, 41 *L.Ed.*2d 1039 (1974); also, *Environmental Protection Agency* v. *Mink*, 410 *U.S.* 73, 93 *S.Ct.* 827, 35 *L.Ed.*2d 119 (1973); *Nixon* v. *Administrator of General Services*, 433 *U.S.* 425, 97 *S.Ct.* 2777, 53 *L.Ed.*2d 867 (1977). Since the *in camera* inspection itself "partially destroys the privilege"—and the privilege in this case is deserving of the strongest support—the standards for permitting even so limited a breach of confidentiality should be exacting. Certain initial or threshold showings of need must be required and the burden of convincing the court that such need exists should be a substantial one. Thus an *in camera* inspection of a newspaperman's work or work product ought not be allowed unless a defendant has demonstrated in convincing fashion that (1) such information probably

contains evidence relevant and material to the question of guilt; (2) in the context of the criminal trial such information appears necessary in the search for truth; and (3) there are no other feasible alternative sources or less intrusive means by which the same evidence can be procured. Additionally, it should be shown that the request for information is not overbroad, oppressive or unreasonable. These criteria overlap those generally applicable to the issuance and enforcement of subpoenas even in the absence of a claim of privilege. *R.* 1:9-2; *e.g. State* v. *Cooper*, 2 *N.J.* 540 (1949); *cf. Schlossberg* v. *Jersey City Sewerage Authority*, 15 *N.J.* 360 (1954); *Wasserstein* v. *Swern and Co.*, 84 *N.J. Super.* 1, 6-7 (App. Div. 1964); *State* v. *Asherman*, 91 *N.J. Super.* 159, 162 (Cty. Ct. 1966). The existence of the privilege, however, enhances the quality of proofs required for the production of evidence. Where the claims for subpoenaed materials implicate privileged interests, and the privilege invoked is of singular importance, as here, the court's insistence upon the requisite showing of need should be unyielding and meticulous. *Cf. United States* v. *Nixon, supra*, 418 *U.S.* at 697-702, 94 *S.Ct.* at 3102-3105, 41 *L.Ed.*2d at 1058-1061.

III

In applying these principles to this case, we are confronted with certain disabling limitations not of our making. In our appellate review of the contempt judgments on an accelerated basis we have not been made privy to the total record or even a substantial part thereof. In view of the conclusory expression of the trial court judge in justification of his June 30 order for *in camera* inspection and the absence of any findings or exposition of his reasoning, I do not believe we are in a position to assess the validity of the order or to consider the reasonableness of appellants' refusal to obey that order.

It is argued by defendant that there is a record basis for the judge's conclusion that it would be "impossible" to weigh appellants' substantive claims without an *in camera* inspection of the subpoenaed material. The majority has adopted defendant's rendition of the record to show that there are several instances where appellant Farber is likely to have relevant and necessary information. Unfortunately we do not have the slightest hint that the trial judge contemplated these examples in reaching his ultimate conclusion or in what way he might have considered that information to be relevant and necessary. Rather it appears so far that the basis for the court's order for *in camera* inspection was the same advanced for the initial and second certificates of materiality issued by the trial judge. These certificates disclose some likelihood that some material sought is relevant; they yield only a bare conclusion as to its necessity, are silent as to alternative sources and are indifferent to matters of overbreadth, oppressiveness and unreasonableness. The determination of the New York court as to the adequacy of the initial certificate of materiality, which resulted in the issuance of the subpoenaes, though buttressed by a hearing as required under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (*N.J.S.A.* 2A:81-19 et seq.; N.Y. *Crim. Proc. L.* § 640.10 (McKinney 1971), was not based on matters of record which appreciably augmented that furnished in connection with the certificate of materiality. Moreover, it was assumed by the New York court that appellants would be given a further opportunity to demonstrate on grounds of reasonableness and privilege that the subpoenas should not be enforced.

It may be that the ultimate conclusion of the trial judge as to the necessity for *in camera* inspection is sound and can be supported by the record. But for us to so rule on

hypothetical findings extrapolated from only a small part of a huge record would be a flight of fancy. This is not a proper case for the exercise of original jurisdiction. *R.* 2:10-5. This is peculiarly so in view of the high order of the proofs which I consider requisite to establish the threshold requirements of relevance, necessity and the absence of alternatives. In view of the gravity of the issues and the complexity of the record, only a tip of which has been exposed to us, it should be the obligation and province of the trial judge to explain to the litigants, and the appellate court, why he has ordered an *in camera* inspection of confidential matter. *Cf. United States* v. *Nixon, supra.*

A party whose claim of a strong statutory privilege has been thus overborne and who has been visited with a compulsory turnover order which constitutes a real invasion of confidentiality, and has been adjudicated guilty of the crime of contempt and subjected to onerous civil as well as punitive sanctions, is entitled to redress. The proper solution, I feel, would be a remand to complete the record. This can be done by the trial judge making findings in support of his conclusion that an *in camera* inspection of the subpoenaed evidence is now necessary as a prelude to further proceedings in the criminal trial. This will enable us to determine whether the requisite showing has been made with respect to the threshold issues and to accord appellants the judicial review to which they are entitled. Since it appears that the judge is thoroughly immersed in the case and conversant with all of its facets and that the parties have had numerous opportunities to impress upon the trial court their positions with respect to the materials sought, a further hearing at this juncture is not required as a matter of fair procedure or due process. Because the issues engage so completely the knowledge and discretion of the trial judge, however, he should not be precluded from permitting the parties to supplement the record by

affidavit or limited testimony if this appears desirable or necessary. In view of the exigencies of the trial, this course is not mandated. These same exigencies reasonably dictate that this Court should retain jurisdiction of this proceeding and direct that the trial judge submit his finding within a few days.

Under these circumstances, the judgments of contempt should be vacated. Criminal contempt proceedings are attended with virtually the same solemnity as ordinary criminal actions. *N.J. Dept. of Health* v. *Roselle*, 34 *N.J.* 331 (1961); *In re Ruth M. Buehrer*, 50 N.J. 501 (1967). These include notice of the essential elements of the charges and a reasonable opportunity to challenge their sufficiency. *In re Tiene*, 17 *N.J.* 170 (1954). The appellants did not have an adequate opportunity to confront the merits of the enforcement order of June 30, 1978, which constitutes the basis of the contempt proceedings. In the absence of any disclosure by the trial judge as to his specific reasons compelling the *in camera* inspection, there was no viable chance for appellants to defend against the order to enforce on the grounds of privilege and the invalidity of the subpoenas. Since the hearings in both contempt proceedings, that in aid of a litigant as well as the criminal action, were substantially merged, the vice of inadequate notice and opportunity to challenge infects each. I would therefore vacate both contempt judgments.

APPENDIX B

Order to Produce of the Superior Court of New Jersey, June 30, 1978

FILED
WITH SUPERIOR COURT
Jun 30 1978

FILED
Jun 30 1978
/s/
BERGEN COUNTY CLERK
HACKENSACK, N.J.

WILLIAM J. ARNOLD
J.C.C.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

Indictment No. S-495-76

STATE OF NEW JERSEY

vs.

MARIO E. JASCALEVICH,

Defendant

MOTION TO QUASH SUBPOENAS DUCES TECUM BY THE NEW YORK TIMES COMPANY AND MYRON FARBER

THIS MATTER having been presented to the Court by Eugene R. Scheiman, Esq., of the New York Bar, admitted *pro hoc vice*, for Winne, Banta, Rizzi & Harrington, Esqs., and Cahill, Gordon and Reindel, Esqs., attorneys for Myron Farber and The New York Times Company, upon the application for an Order quashing certain subpoenas *duces tecum* requiring The New York Times Company and Myron Farber to produce materials produced or obtained by them in the course of investigative reporting of the criminal matter herein; and Assistant Bergen County Prosecutor Sybil Moses having appeared on behalf of the State of New Jersey; and Raymond A. Brown, Esq., of Brown, Vogelman & Brown, esqs., having appeared on behalf of the defendant, Mario E. Jascalevich; and the Court having considered the briefs and affidavit and argument of Counsel and the Court having delivered an oral opinion to the effect that Myron Farber and The New York Times Company have not shown any justification or legal reasons for granting the motion, and for the reasons stated by the Court on June 30, 1978, which are hereby incorporated in this Order as if set forth at length and contained herein, and for good cause appearing,

IT IS on this 30th day of June, 1978, ORDERED that the Motion of Myron Farber and The New York Times Company for an Order quashing certain subpoenas *duces tecum* be and is hereby denied, and it is

FURTHER ORDERED that Myron Farber and The New York Times reserve the right to renew the application subject to the production of the materials related to the subpoenas for this Court's consideration and examination, and it is

FURTHER ORDERED that Myron Farber and The New York Times Company are to appear and testify on Monday, July 3, 1978 at 12 noon, or at such other time as the Court may set and produce the subject documents for this Court's consideration and review.

/s/ WM. J. ARNOLD
WILLIAM J. ARNOLD,
J.C.C. T A J.S.C.

APPENDIX C

Oral Opinion of the Superior Court of New Jersey, June 30, 1978

THE COURT: Counsel bring this motion on behalf of Myron Farber and the New York Times Company for an order quashing subpoenas duces tecum requiring the New York Times Company and Myron Farber to produce materials produced or obtained by them in the course of investigative reporting of the criminal matter herein; and that's in the case of the State of New Jersey versus Mario Jascalevich.

Mr. Farber and the New York Times have appeared in this action two times before: Once when they contested a Sequestration Order of this Court; and when Mr. Myron Farber appeared and testified concerning his access to the Prosecutor's files on the defendant Jascalevich.

He also testified as to some other matters and exercised his newspaperman's privileges on some of these questions.

It might be well to point out that the defendant is charged in this case with murdering five people; and that this trial was first started on February 27th, 1978.

Now, certain facts for the purpose of this motion have been stipulated to and are part of the record; and we have Exhibits 1Q through 5Q; and they've been marked with such other numbers because I have many other exhibits and motions, and it's to identify with this particular motion.

Those exhibits and stipulations concerned a subpoena ad testificandum which was served on Mr. Farber on March 1st, 1978, in this State; and subsequent to that subpoena, he has appeared and testified, as I said before, on hearings out of the presence of the jury; and counsel stipulated there was an attempt to serve a subpoena duces tecum on Mr. Farber when he appeared here, I think, on one of the hearings, pursuant to the Uniform Act to compel the attendance of witnesses from out of State in criminal proceedings, which is shown in our Statutes under New Jersey Statutes Annotated 2A:81-18, and so forth, and the New York Act which appears to be almost exactly alike, cited at *McKinney C.P.L.*, Section 640-10.

Now, the applicants here were ordered by the New York Supreme Court to attend and produce materials in the two subpoenas duces tecum and to produce them in this court.

The Appellate Division of New York heard the matter and upheld the Lower Court as did New York State's Highest Court by declining to hear the appeal.

Now, the applicants have failed to obey the Order of the New York Courts which directed them to honor the subpoenas duces tecum served on Mr. Farber in the New York Times; and they have failed as ordered to attend and produce certain documents set forth in the Order.

Now, movants contend that the Court has no jurisdiction over the witness Farber and The New York Times, referred to in this motion as the applicants; and that they do not need to produce the articles in the subpoena duces tecum; but they argue the motion to quash without producing the items and ask the Court, which were asked for in court in the subpoena—well, I better say which were asked for by the defendants in the subpoena.

The applicants want to quash this motion without producing those items for the Court to examine.

In *Field versus Field*, 31 New Jersey Super, 139 (Appellate Division 1955), it was said that jurisdiction of a Court may be defined simply as the right or authority to adjudicate concerning the subject matter of a particular controversy; and they cite 14 Am. Jur. Courts, Section 160.

It is true that jurisdiction is normally extended only within the territorial boundaries of State; however, I have noted in *Field versus Field* at Page 45 where the Court said the following:

"The deficiency waived by voluntary appearance in the action—may be waived by a voluntary appearance of the

action. Such an appearance is one whereby the defendant submits his person to the jurisdiction involving the judgment of the Court on any question other than that of jurisdiction over his person."

The appearance by Mr. Farber and The New York Times in my opinion clearly constituted a waiver of any jurisdictional claims. As further noted in *Field versus Field*, supra, which cited 3 Am. Jur. to Appearances, Section 3, Page 783, and they said this:

"Generally, an appearance for any other purpose, at least one bearing substantial relationship to the cause, waives objections to the jurisdiction over the person of the defendant. A general appearance may arise by implication from the defendant's seeking, taking, or agreeing to take some steps or proceeding in the cause beneficial to himself or detrimental to the plaintiff, other than one to contest the jurisdiction only."

In *Swanson versus Swanson*, 8 New Jersey, 169, (1951), it was held that a witness appearing in a matter is not immune from service relative to the action in which he is appearing.

At Page 179 in that case, the Court said the following, and I'm quoting:

"On the other hand, in *Murray versus Elston*, 23 New Jersey Equity, 212, Chapter 1872, the Court properly held that a witness who had responded to a subpoena from out of the State was liable and could be served with a subpoena duces tecum to produce documents evidential in the cause being heard. See also *Norris versus Hassler*, 23 Federal, 581 (1885)."

Going on, the Court said:

"It has likewise been held in *Leman versus Krenller-Arnold Hinze Last Company*, 234 United States, 448, 76

Lawyers Edition, 389, 52 Supreme Court, 238, (1932), that process in a civil contempt may be served out of the State where the party having submitted to the jurisdiction has left the State."

The Court quoted Mr. Justice Holmes' statement in *Michigan Trust Company versus Ferry*, 228 United States, 346, 353, 57 Lawyers Edition 867, 33 Supreme Court, 550 (1913) and said:

"Where there is 'service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.'"

And I'm quoting from that passage.

There's no question in my mind that in view of our law and other cases that I have just cited that the Court has the power to compel Mr. Farber and The New York Times to appear and produce before me the materials and items mentioned in the subpoenas.

On another theory, the Full Faith and Credit Clause of the Federal Constitution, Article 4, Section 1, implemented by 28 United States Code Annotated 1738, formerly 687, allows the Court to give full faith and credit to the order of judgment of Justice Rothwax.

It's impossible for this Court to decide whether the subpoena duces tecum should be quashed without seeing the statements, the memorandum, and the articles referred to if they do exist, and those that are set forth in the subpoena.

This Court can't answer the materiality and the privilege that the witness asserts under the newspaperman's privilege or any of the other questions.

The Court is being asked to make a decision in a vacuum. When the articles are produced before this Court, this Court may very well decide to quash the subpoena.

When the items are produced, this Court will give the applicants a full hearing as to the materiality of the subpoena, its scope and its contents.

The Court will also decide if the items are barred by the Shield Law and any other legitimate defense that may be asserted.

The applicants seem to say to the Court:

Make the decision as to the materiality and the Shield Law without seeing the items that are requested in the subpoena; and then if the Court decides that they are material, the applicants indicate they may very well appeal.

If they lose, they would then say to the defendant: Now, go and pursue your remedies in the State of New York.

In a criminal case such as this, time is of the essence. This Court cannot sanction such a degenerate process. There is nothing in the First Amendment that gives the responsibility to the applicants to decide whether the information sought falls within or beyond the scope of the privilege.

In *Schlossberg versus Jersey City Sewerage Authority*, 15 New Jersey, 361 at Page 372, that a Justice of the Supreme Court, Justice Brennan, now a Supreme Court Justice said:

> "The witness is not the judge of the relevancy of the matter."

In order to protect the due process rights of the defendants, I refer you to *Farr versus Pitchess*, 522, Federal Reporter Second, Page 464, United States Court of Appeals, Ninth Circuit; and, of course, I refer you, and I know you're all familiar with *Branzburg versus Hayes*, 408

United States, 665, 92 Supreme Court, 264, 33 Lawyers Edition Second, 629 (1972) which discusses very thoroughly a newspaperman's rights under the First Amendment.

Coupled with the *Hayes* case is the case of *United States versus Caldwell*, which incidentally involved a subpoena duces tecum.

To insure that justice is done, it is imperative to the function of this Court that a compulsory process be available for the production of evidence needed by either the plaintiff or the defendant or the State. See *United States versus Nixon*, 418 United States, 683, 94 Supreme Court Reporter, 3096, 41 Lawyers Edition Second, 1039.

It is, therefore, ordered that The New York Times, through an appropriate official, and Myron Farber, a newspaper reporter for the Times, appear before me, this Court, at twelve o'clock Monday noon, July 3rd, in compliance with the subpoenas duces tecum, and bring to me for my examination the items and materials called for in the subpoenas for my examination and hearing; and that if they fail to do so, an Order to Show Cause as to why they should not be held in contempt of this Court will issue to be heard by the Assignment Judge, Theodore Trautwein or by such judge designated by him.

You are directed, Counsel, to wait; and I have an Order prepared; and you can examine it, and I will sign it so you'll have it.

> MR. BROWN: Thank you, Judge.
>
> MR. SCHEIMAN: Your Honor, for the sake of the Record, I would like to take exception to the ruling and ask the Court stay its Order until such time as we appeal to the Appellate Division.
>
> THE COURT: The stay is denied.

(Remaining colloquy between Counsel and the Court not transcribed.)

Appendix C

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

INDICTMENT NO. S—495-76

THE STATE OF NEW JERSEY,

—VS—

MARIO E. JASCALEVICH,

Defendant.

MOTION TO QUASH SUBPOENAS DUCES TECUM BY THE NEW YORK TIMES COMPANY AND MYRON FARBER.

CERTIFICATION:

I, Hedi M. Witkowski, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.

/s/ HEDI M. WITKOWSKI

.....

Hedi M. Witkowski
Official Court Reporter
Hudson County Courthouse
Jersey City, New Jersey

Dated: 7-2-78

APPENDIX D

Opinion of New York Supreme Court, June 2, 1978

SUPREME COURT—NEW YORK COUNTY

TRIAL TERM—PART 35

Index No. 8867/78

IN THE MATTER OF

THE SUPERIOR COURT OF THE STATE OF NEW JERSEY,

Petitioner,

—against—

MYRON FARBER and THE NEW YORK TIMES,

Respondent

APPEARANCES

For the Petitioner:
Ronald J. Levine, Esq.
New York, New York

For the Respondents:
Eugene R. Schuman, Esq.
New York, New York

ROTHWAX, J:

This is an application pursuant to the Uniform Act to Compel the Attendance of Witnesses from Without the (demanding) State, enacted in CPL 640.10 subd (2) and Title 2a of New Jersey Statutes Annotated, §§ 81-18, et seq. The application is made upon the certificate of Judge William Arnold of the New Jersey Superior Court, Bergen County. Judge Arnold certifies that certain documents in the possession of Myron Farber, a newspaper reporter, and/or the New York Times are necessary and material to the defense of a criminal proceeding in Bergen County.

Appendix D

Accordingly, Judge Arnold has invoked the process of this court to issue a subpoena duces tecum for such documents, returnable in Bergen County. There is no doubt that CPL 640.10 subd (2) comprehends subpoenas duces tecum as well as subpoenas ad testificandum. State of Washington v Harvey, 10 AD2d 691, app. dsmd 8 NY2d 865.

Respondents oppose the issuance of a subpoena on two grounds. First, respondents alleged the certificate and supporting papers are insufficient as a matter of law to show the materiality and need for the documents in the Bergen County trial. By the terms of the statute, the certificate from the requesting State is prima facie evidence of the facts stated therein. CPL 640.10 subd (2). The court of the requesting state properly determines whether the witness or document sought is material. (People v McCartney, 38 NY2d 618, 621). While the certificate and supporting affidavits must support the assertion of materiality, an application under the Uniform Act is entitled to full faith and credit in the absence of an abuse of discretion or evidence of arbitrariness by the issuing judge (cf. People v McCartney, supra p 623). This court finds that the certificate of Judge Arnold and the supporting affidavits establish a sufficient factual predicate for the finding of materiality and need. The documents requested consist of notes taken by respondent Farber in the course of interviews with persons who have subsequently testified for the prosecution in the Bergen County trial. Respondent Farber's articles, based upon those interviews, led to the prosecution. Respondent Farber apparently cooperated closely with the prosecuting authorities and disclosed information previously unknown to them. The information sought is in the nature of Rosario material (People v Rosario, 9 NY2d 286, cert den 358 US 866). Respondents have not produced any evidence to rebut the prima facie validity of Judge Arnold's findings. This court is cognizant of Judge Arnold's familiarity with the issues involved in this case, over which he has presided through two years of preliminary hearings and twelve weeks of trial.

Appendix D

Respondents further oppose the requested subpoena on the grounds that compliance therewith would cause undue hardship by sacrificing their statutory newspapermen's privilege under New York law (Civil Rights Law, § 79-h). Respondents contend that New York Law offers broader privilege from disclosure of news sources than does New Jersey law. Even so, this court finds that no substantive right, constitutional or statutory, would be forfeited were respondents to submit to New Jersey's jurisdiction. New Jersey courts are bound to allow full faith and credit to the laws of New York when necessary to protect the statutory entitlements of New York citizens. If the documents, as alleged, are privileged by virtue of New York law, then they are no less privileged in New Jersey than in New York. The certificate clearly contemplates a hearing in the New Jersey forum at which all issues of privilege, statutory and constitutional, may be raised. (cf State of Washington v Harvey, supra, et 692.) In fact, respondent Farber has previously appeared in New Jersey, testified at a suppression hearing, and successfully invoked his privilege. The court also notes that, insofar as prosecution witnesses have testified that they discussed the case with respondent Farber, the confidentiality of these witnesses as news sources has been abridged and no privileged interest survives to be protected. (cf. Branzburg v Hayes, 408 US 665; 695; see also, State of Florida v Vincent, 80 Misc 2d 419, 420.) Accordingly, the court finds that no hardship will result from respondents' compliance with a subpoena duce tecum returnable in Bergen County, New Jersey. So ordered.

Dated: June 2, 1978

/s/ HPR

.....

J

APPENDIX E

Requisitions for Prisoner of the Superior Court of New Jersey

(see opposite) ☞

REQUISITION FOR PRISONER

SUPERIOR COURT — BERGEN COUNTY — COUNTY COURT

Theodore D. Trautwein Judge

ROGER W. BRESLIN, JR. Prosecutor — JOSEPH F. JOB Sheriff

I, ROGER W. BRESLIN, JR., Prosecutor of the Pleas of Bergen County, N. J., do hereby request the Sheriff of Bergen County to cause The New York Times Co. to appear at the Bergen County Court Room 310 to be held in the Court House, Hackensack, in and for the County of Bergen, on Mon. the 24th of July 19 77 next, at the hour of 10:00

DISPOSITION AS BELOW

Charged with Contempt of Court

Rule 1:10-2 Fine of $100,000.00
(one hundred thousand dollars)

Rule 1:10-5 Fine of $5,000.00
(five thousand dollars)
for every day that elapses until the required documents are delivered to Judge Arnold

Bail $

Date

Prisoners Must Be Taken To Court House Accompanied By Requisition.

Every prisoner fined must be returned to the jail to pay the fine.
Every prisoner taken from the jail to the Court must be returned to the jail.
Three of these requisition slips signed by the Clerk of the Court must accompany prisoners returned to the jail after sentence or arraignment.

James A. Vasios
Court Clerk

Appendix E

(see opposite) ☞

APPENDIX E

REQUISITION FOR PRISONER

SUPERIOR COURT — BERGEN COUNTY — COUNTY COURT

Judge

JOSEPH C. WOODCOCK, Prosecutor — JOSEPH F. JOB, Sheriff

I, JOSEPH C. WOODCOCK, Prosecutor of the Pleas of Bergen County, N. J., do hereby request the Sheriff of Bergen County to cause _____ to appear at the Bergen County Court Room 310 to be held in the Court House, Hackensack, in and for the County of Bergen, on _____ the 24th of July 19 75 next, at the hour of _____

DISPOSITION AS BELOW

Charged with _____

Bail $ _____

Date 7/24/75

_____
Court Officer

Prisoners Must Be Taken To Court House Accompanied By Requisition.

Every prisoner fined must be returned to the jail to pay the fine.
Every prisoner taken from the jail to the Court must be returned to the jail after being sentenced.
One of these requisition slips signed by the Clerk of the Court must accompany prisoners returned to the jail after sentence of arraignment.

_____
Court Clerk

APPENDIX F

Subpoenas *duces tecum* Issued June 2, 1978

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

No. 8867/78

In the Matter of the Application of the Superior Court, Bergen County, State of New Jersey to Compel the Presentation of Certain Documents Deemed to be Material in a Criminal Prosecution

---

Subpoena Duces Tecum to Secure Attendance of Witness
At Criminal Proceeding

To: The New York Times
229 West 43rd Street
New York, New York

The Superior Court of Bergen County, State of New Jersey, a court of record, having made and filed a certificate pursuant to Section 640.10 of the Criminal Procedure Law of the State of New York in which it appears:

FIRST: That there is now pending in the Superior Court of New Jersey, Bergen County, a criminal prosecution by the State of New Jersey against Mario E. Jascalevich, wherein the said Mario E. Jascalevich stands accused and charged with having committed five murders contrary to N.J.S.A. 2A: 113-1;

SECOND: That there are certain documents in the possession of The New York Times which are necessary and material for the defendant in this criminal proceeding;

Appendix F

THIRD: That the presence of The New York Times will be required before the Superior Court of New Jersey, Bergen County on June 6, 1978 in order to deliver the documents before the Honorable William J. Arnold in Hackensack, New Jersey;

AND a hearing having duly been held on May 31, 1978 to determine whether said documents should be presented in the New Jersey criminal prosecution;

and

IT APPEARING that it will not cause undue hardship to the said The New York Times to be compelled to attend and to present certain documents deemed to be material in the criminal prosecution in Bergen County, State of New Jersey, that the laws of the State of New Jersey will give said The New York Times protection from arrest and the service of civil and criminal process while attending such criminal prosecution, and that a check in the amount of the witness fees provided by law has been submitted with the aforesaid certificate, and

THIS COURT relying on the reciprocity between the State of New Jersey and the State of New York pursuant to their mutual adoption of the Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Cases, and upon the good faith of the Superior Court of Bergen County of the State of New Jersey, and being satisfied that the attendance of The New York Times as a witness in order to present certain material documents is in the public interest.

NOW YOU ARE COMMANDED To attend as a witness in the above mentioned prosecution, on June 6, 1978, before the Superior Court of New Jersey, Bergen County, and to produce at such time and place all statements, pictures,

memoranda, recordings, and notes of interviews of witnesses for the defense and prosecution in the above proceeding as well as information delivered to the Bergen County Prosecutor's office and contractual information relating to the above, which are in the possession, custody or control of The New York Times, and for a failure to attend you will be liable to be punished in the manner provided by law for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

/s/ H R

.....

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

No. 8867/78

In the Matter of the Application of the Superior Court, Bergen County, State of New Jersey to Compel the Presentation of Certain Documents Deemed to be Material in a Criminal Prosecution

---

SUBPOENA DUCES TECUM TO SECURE ATTENDANCE OF WITNESS AT CRIMINAL PROCEEDING

To: Myron Farber
178 East 70 Street
New York, New York

The Superior Court of Bergen County, State of New Jersey, a court of record, having made and filed a certificate pursuant to Section 640.10 of the Criminal Procedure Law of the State of New York in which it appears:

FIRST: That there is now pending in the Superior Court of New Jersey, Bergen County, a criminal prosecution by the State of New Jersey against Mario E. Jascalevich, wherein the said Mario E. Jascalevich stands accused and charged with having committed five murders contrary to N.J.S.A. 2A: 113-1;

SECOND: That there are certain documents in the possession of Myron Farber which are necessary and material for the defendant in this criminal proceeding;

THIRD: That the presence of Myron Farber will be required before the Superior Court of New Jersey, Bergen

County on June 6, 1978 in order to deliver the documents before the Honorable William J. Arnold in Hackensack, New Jersey;

And a hearing having duly been held on May 31, 1978 to determine whether said documents should be presented in the New Jersey criminal prosecution:

and

It Appearing that it will not cause undue hardship to the said Myron Farber to be compelled to attend and to present certain documents deemed to be material in the criminal prosecution in Bergen County, State of New Jersey, that the Laws of the State of New Jersey will give said Myron Farber protection from arrest and the service of civil and criminal process while attending such criminal prosecution, and that a check in the amount of the witness fees provided by Law has been submitted with the aforesaid certificate, and

This Court relying on the reciprocity between the State of New Jersey and the State of New York pursuant to their mutual adoption of the Uniform Act to Secure Attendance of Witnesses From Without the State in Criminal Cases, and upon the good faith of the Superior Court of Bergen County of the State of New Jersey, and being satisfied that the attendance of Myron Farber as a witness in order to present certain material documents is in the public interest.

Now You Are Commanded to attend as a witness in the above mentioned prosecution, on June 6, 1978, before the Superior Court of New Jersey, Bergen County, and to produce at such time and place all statements, pictures, memoranda, recordings, and notes of interviews of witnesses for the defense and prosecution in the above proceeding as well as information delivered to the Bergen

County Prosecutor's office and contractual information relating to the above, which are in the possession, custody or control of Myron Farber, and for a failure to attend you will be liable to be punished in the manner provided by Law for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

/s/ H R

.....

J.S.C.

GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525

Supreme Court, U. S.
FILED
OCT 19 1978

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
MYRON FARBER,
Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN SUPPORT OF PETITION

JOHN J. DEGNAN,
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Attorney for Respondent,
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JOHN J. DEGNAN,
Of Counsel and
on the Memorandum.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623 8611

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
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Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

STATEMENT OF RESPONDENT

This memorandum is in response to the Petition for Writ of Certiorari filed on behalf of petitioners, the New York Times Company and Myron Farber. Petitioners seek a Writ of Certiorari to the Supreme Court of New Jersey seeking review of a judgment and opinion, —— N.J. —— (September 1, 1978), which sustained judgments of criminal contempt and civil contempt (in aid of litigant's rights) imposed upon petitioners for failure to comply

with subpoenas *duces tecum* and enforcement orders issued during the course of an ongoing murder trial.

Respondent, Attorney General of New Jersey, was directed to prosecute the criminal contempt proceedings in the Superior Court of New Jersey, Law Division. See R. 1:10-4. Subsequently, the appeals from the judgments in aid of litigant's rights and criminal contempt were consolidated by the Superior Court, Appellate Division, and certified directly to the New Jersey Supreme Court without argument or decision in the Appellate Division. The contempts resulted from petitioners' refusal to comply with the trial court's order to deliver the subpoenaed material to the Court for *in camera* inspection prior to the Court's determination as to certain claims of petitioners directed to the propriety, legality and scope of the subpoenas *duces tecum*. Petitioners asserted that the First Amendment and New Jersey News Media Privilege, N.J.S.A. 2A:84A-21 and 21a, protected the subpoenaed material from disclosure.

In both the Appellate Division and the Supreme Court of New Jersey, the Attorney General argued that the matter should be remanded because petitioners had not been afforded a hearing below to require defendant Jascalevich to demonstrate a threshold showing of relevance, materiality and need, to consider the scope of an apparently all-inclusive subpoena and to consider the possibility of other nonprivileged or less intrusive means of securing the materials sought. We also urged there that requiring the *in camera* production of all materials sought prior to a determination of the good faith nature of the requests represented a serious potential abuse of the Sixth Amendment compulsory process clause. Although these arguments were grounded primarily on the need to balance the State's News Media privilege against defendant's Sixth Amendment rights, it is even more strongly applicable in the context of a privilege cloaked with First Amendment protections.

The majority of the New Jersey Supreme Court rejected all of petitioners' claims, including those asserted under the First Amendment, and held that while a "balancing test" was required in future cases involving the State statutory privilege, the First Amendment afforded petitioners no protection. The Court determined that newspapermen had no First Amendment right to a hearing to determine whether and to what extent the subpoenaed material was protected by the First Amendment. The majority specifically rejected the fact that a "balancing test" was required by virtue of Mr. Justice Powell's vote and concurring opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

The Attorney General of New Jersey supports the petitioners' application for a Writ of Certiorari in this case. Clarification of the *Branzburg* holding would be appropriate in light of the conflict among lower state and federal courts with respect to whether a "balancing test" is required by the First Amendment upon an application to quash or limit a subpoena *duces tecum* addressed to a member of the news media prior to the return of such subpoena. Given the ongoing underlying murder prosecution and the nature of "in aid" proceedings, the First Amendment issue should be expeditiously resolved with finality.

In the course of his opinion for the majority of the New Jersey Supreme Court, Mr. Justice Mountain stated:

> The point to be made, however, is that among the many First Amendment protections that may be invoked by the press, there is not to be found the privilege of refusing to reveal relevant confidential information and its sources to a grand jury which

is engaged in the fundamental governmental function of '[f]air and effective law enforcement aimed at providing security for the person and property of the individual . . .' [408 U.S. at 690, 33 L.Ed.2d 644] The reason this is so is that a majority of the members of the United States Supreme Court have so determined.

Faced with this conclusion, appellants appear to argue that Justice Powell's concurring opinion in *Branzburg* somehow fails to support this result. The argument is without merit. We do not read Justice Powell's opinion as in any way disagreeing with what is said by Justice White. But even if it did, it would not matter for present purposes. The important and conclusive point is that members of the court have all reached the conclusion that the First Amendment affords no privilege to a newsman to refuse to appear before a grand jury and testify as to relevant information he possesses, even though in so doing he may divulge confidential sources. The particular path that any justice may have followed becomes unimportant when once it is seen that a majority have reached the same determination.

Thus, we do no weighing or balancing of societal interests in reaching our determination that the First Amendment does not afford appellants the privilege they claim. The weighing and balancing has been done by a higher court. Our conclusion that appellants cannot derive the protection they seek from the First Amendment rests upon the fact that the ruling in *Branzburg* is binding upon us and we interpret it as applicable to, and clearly including, the particular issue framed here. It follows that the

obligation to appear at a criminal trial on behalf of a defendant who is enforcing his Sixth Amendment rights is at least as compelling as the duty to appear before a grand jury. (Slip opinion at 10-12; petitioners' appendix at 8a-10a)

In his separate dissent, Mr. Justice Handler stated:

> It is, I believe, in necessary recognition of the First Amendment concern for the unfettered functioning of the news media in a free and democratic society that many courts have espoused the 'balancing' approach articulated by Justice Powell . . . These decisions take *Branzburg* perhaps further than justified by a flat reading of either its majority or concurring opinion. They nevertheless show, as does *Branzburg,* that the reporter's conduct in obtaining and recounting news is a matter of constitutional consideration. A newsman's interest in the gathering of news is an indispensable component in its dissemination and a vital incident to freedom of the press. . . . That interest is therefore entitled to protection. In this perspective the reporter stands apart from the ordinary citizen and although he is not thereby shed of the burdens of citizenship and must respond as any citizen to legal process, he should not needlessly be hobbled in the pursuit and presentation of news. Constraints upon the news media should therefore be tolerated only when they are essential in the good faith discharge of legitimate governmental objectives, or when clearly required for the vindication of individual constitutional rights. We are here confronted with such a case and it is in this framework that the fundamental, contending claims of the principals should be assessed. (Slip opinion

at 8-10; petitioners' appendix at 46a-47a). (citations omitted)*

The differences in approach evidenced by the four opinions of the New Jersey Supreme Court underscore the existing conflict in interpretation of *Branzburg*. There is, indeed, a difference of view as to whether *Branzburg* requires a "balancing test," particularly in light of the fact that the fifth vote in *Branzburg* was cast by Mr. Justice Powell. See and compare *Farr* v. *Pitchess*, 522 F.2d 464 (9 Cir. 1975), *cert.* den. 427 U.S. 912 (1976); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.) *cert.* dismissed 470 U.S. 938 (1974); *United States* v. *Liddy*, 354 F.Supp. 228 (D.D.C. 1972); *Zelenka* v. *Wisconsin*, —— Wis. ——, 266 N.W.2d (Sup.Ct. 1978); *Brown* v. *Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (Sup.Ct.) *cert.* den. 419 U.S. 966 (1974); *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (Sup. Ct. 1974); *Rosato* v. *Superior Court of Fresno Cty.*, 51 Cal. App. 3d 212, 124 Cal. Rptr. 427 (Ct. App. 1975), *cert.* den. 427 U.S. 912 (1976).

The Attorney General of New Jersey submits that, in light of the conflict among lower courts concerning the impact of Mr. Justice Powell's concurrence in *Branzburg*, *certiorari* should be granted to determine whether First Amendment rights must be balanced against Sixth Amend-

* Mr. Justice Handler concluded that the protection embodied in the New Jersey News Media Privilege, enacted in response to *Branzburg*, was not absolute and had to bend to valid Sixth Amendment claims. He, however, concluded that the record in this case did not justify a finding that the privilege was not applicable. Mr. Justice Pashman also dissented asserting the denial of due process based upon the failure to afford petitioners a hearing prior to requiring the disclosure *in camera*. The Chief Justice concurred in the majority opinion and also filed a separate concurring opinion.

ment claims with respect to materials subpoenaed from members of the news media and, if so, the constitutional nature of the "balancing test" to be applied.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey

Supreme Court, U. S.
FILED
NOV 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-540

THE NEW YORK TIMES COMPANY and
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Petitioners,

v.

THE STATE OF NEW JERSEY and
MARIO E. JASCALEVICH,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION

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IN THE

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v.

THE STATE OF NEW JERSEY and
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On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

RESPONDENT'S STATEMENT IN OPPOSITION TO PETITION

Questions Presented

1. Whether a state legislature can deprive a criminal defendant of his Sixth Amendment right and similar

rights guaranteed by the state constitution, by enacting a statute establishing a reporter's privilege?

2. Whether a reporter and a newspaper can properly be held in contempt for refusing to comply with a valid *subpoena duces tecum* thereby obstructing justice and depriving a criminal defendant of a fair trial when legitimate demand has been made for documents in their possession, custody or control by aborting the procedure which could truly ascertain the *bona fides* of the claim?

3. Whether a reporter and a newspaper can arrogate to themselves the right to be the ultimate arbiters of a claim of privilege instead of a court of law?

Statement of Respondent

On October 24, 1978, Dr. Mario E. Jascalevich was acquitted of the remaining three counts of a five count indictment for murder that Myron Farber boasted he had instigated. Dr. Jascalevich, his wife and his two children were subjected to a terrible two and one-half year ordeal because Farber, "wants Jascalevich convicted" so that he could "become a very wealthy", according to United States District Court Judge Frederick Lacey.[1]

During the last weeks of the defense presentation, there was an opportunity to more fully explore Farber's role in this case. According to sworn testimony, Farber had indicated several years ago that Dr. Michael Baden was his private source in the New York City Medical Examiner's Office and that together they were secretly going through the office files at night in order to write

[1] Respondent's Appendix Q (submitted in support of motion to vacate stay, heretofore filed with the Court).

certain stories about the Medical Examiner's Office.[2] This is the same Dr. Baden who served as the State's principal witness and who, according to his own testimony, was visited by Farber prior to his first official contact with the Bergen County Prosecutor's Office.[3] It was also the same Dr. Baden who knew of and repeatedly spoke about a file in the New York City Medical Examiner's Office which he knew contained crucial scientific and factual data about the causes of death of several decedent's named in the indictment. That file was missing from the New York City Medical Examiner's Office when a search was made for it in connection with this case. That data had been reviewed by Dr. Milton Halpern, then the Chief Medical Examiner of New York, who decided that it was not worthy of additional work because there was no criminality involved. Mrs. Milton Halpern, who served from 1961-1974 as Dr. Halpern's personal secretary also observed Dr. Baden attempting to facilitate surreptitious entry into Dr. Halpern's office where this file was kept.

Given this factual background, as well as other information known to defense counsel since the beginning of the trial, it is easier to recognize why Petitioners fought even the *in camera* examination of the subpoenaed materials and a hearing. The hearing would have conclusively demonstrated that Faber and *The New York Times* had no legiti-

[2] Farber denied this, as he has denied many of his actions or tried to explain them away. Where his veracity has been tested, he has been shown to be less than truthful with the courts. The mere fact that Farber denies—or asserts—something cannot furnish support for Petitioners' position because it is not Farber's word that should be dispositive.

[3] Farber has denied visiting Baden.

mate basis upon which to claim the newsman's privilege in this case. In fact, when a hearing was held on the issue of waiver, the trial court—which had virtually the same information before it as it had on June 30, except for the contractual information—held that Farber had waived his claim to the privilege. Nonetheless, even though this Court vacated a stay entered by Mr. Justice Stewart so that there was no legal justification for refusing to respond, Farber took the law into his own hands and refused to answer specific questions relating to his activities and the documents in his possession when duly ordered by the court. He also refused to respond to questions where his supposed source indicated that no confidential relationship existed. It is also easier to comprehend why "the files of *The New York Times* were clearly and unequivocally sanitized."[4] of any relevant material it had acquired about the case of *State* v. *Jascalevich* and which had been subpoenaed.

It is apparent that the Petitioners will stop at nothing to thwart the legitimate constitutional rights of an accused in imminent jeopardy of life imprisonment. Their position, then and now, was a ruse to prevent the jury from assessing a central issue in the defense to the indictment. That issue, clearly framed in defense counsel's opening statement to the jury[5] was a challenge to the very bona fides of the indictment and the Petitioners participation in it. The defense presented evidence and testimony which demonstrated that Farber and Baden collaborated with the Bergen County Prosecutor's Office to concoct charges of murder against an innocent citizen for pecuniary gain and to advance their careers.

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[4] Appendix MM pp. 11-12.

[5] Appendix LL.

What Petitioners sought in this case was the right to be above the law and accountable only to themselves. They sought the right to tamper with citizens' lives and liberty for their own selfish ends. This was made clear during oral argument before the New Jersey Supreme Court in this action. The Court asked the following question and received the following response on behalf of Petitioners:

> "The Court: * * * Suppose a reporter in the course of his investigation comes upon substantial evidence of innocence and he decides *to withhold that because it will make a blockbuster story later on* that they have convicted an innocent man? Can a defendant who learns that this reporter has evidence of his innocence substantial evidence tending to establish his evidence (sic) require the reporter to produce that? Or is it your position that the Shield Law would prevent him from obtaining it and that the reporter can stand behind the Shield Law and say I don't have to produce it? * * *
>
> Mr. Abrams: Yes, sir. Yes, sir. It is my position—
>
> (Respondents Appendix *infra* 1A-2A) (emphasis added)

Certainly, an attorney claiming the attorney-client privilege could not refuse to disclose evidence of innocence if his purpose was to write a "blockbuster" appeal. Clearly, this shows there must be judicial scrutiny and a check on such excesses proposed by any citizen or corporation.

It is just because of such unprincipled and irresponsible positions as that advocated by Petitioner that the value of a written constitution is once again demonstrated. *Marbury* v. *Madison,* 1 Cranch 138, 176-8 (1803). No branch of government is above the written law See, e.g. *United*

States v. *United States District Court*, 407 U. S. 297 (1972) (customary fourth amendment requirement of judicial approval of search warrant necessary despite Executive's opinion); *Powell* v. *McCormick*, 395 U. S. 486 (1969) (House of Representatives not immune from provisions of written constitution). Nor should the "Fourth Estate" be above the law, either. Petitioners desire to be exempt from the requirements of one part of the Constitution, and yet seek refuge in another constitutional protection for the ability to trifle with an innocent citizen's life, liberty and dignity.

It is therefore not difficult to understand why, in this context, Farber sought to hide from every court—including this Court—the fact that he had a tremendous financial interest in this case and submitted what Judge Lacey found as a fact to be "inaccurate and misleading and fabricating"[6] submissions. It is for just these reasons that the Petitioners should not be the ultimate arbiters of a claim of privilege. Without accountability such abuses as occurred in this case—and there are many not yet presented to this Court—will proliferate. It is for this reason that the control of a privilege must be "in public, not private hands" *Branzburg* v. *Hayes*, 408 U. S. 665, 698 (1972) and why the decision of the New Jersey Supreme Court was

[6] Appendix Q. One may also ask why The New York Times did not inform its readership of Farber's clear conflict of interest since Farber had told them as early as January, 1976, of his intentions to profit financially from his stories. Certainly the newspaper would editorialize eloquently if a public official—such as a judge—had a financial interest is a matter upon which he was supposed to exercise independent judgment. Petitioners have demonstrated that they believe such common practices apply only to others and not to themselves. This is not an indicia of the "fiduciary duty to exercise the protected rights responsibly". *Nebraska Press Assoc.* v. *Stuart*, 427 U. S. 539, 560 (1976) that the press must demonstrate in such cases.

just and proper. The invitation of *Branzburg* to the State Legislatures was not an invitation to rescind the Sixth Amendment or to preclude judicial review of the shield laws.

Since an extended discussion opposing the merits of the Petition for a Writ of Certiorari and addressing the jurisdiction of this Court was presented during Respondent's Motion to Vacate the Stay entered by Mr. Justice Stewart, the attention of the Court is respectfully invited to the extensive appendix, transcripts and briefs submitted at that time.

It is urged, moreover, that this case is a uniquely unsuitable vehicle for addressing the question of how the rights of the press and a defendant are treated during a criminal trial, given Farber's participation in the matter and his defiance of all lawful authority. Hopefully, such an egregious situation will not be repeated. Furthermore, Petitioners have only themselves to blame for the incarceration and fines since they chose to avoid the Declaratory Judgment method of resolving this controversy, N.J.S.A. 2A:16-51 *et seq.*; *State* v. *Baird*, 50 N. J. 376 (1967). Farber apparently chose to try to make himself a martyr for no greater reason than to promote the sale of his book. This is consistent with the position urged upon the New Jersey Supreme Court, and rejected. It should similarly be rejected here and does not merit review.

Respondent Dr. Jascalevich submits in light of the unique facts presented in this case, the full explanations directly to Mr. Farber of the consequences of his conduct and the real result that Petitioners seek—to be the ultimate arbiters of a privilege so they can be accountable to no one—that this case is not appropriate for review and presents no substantial constitutional issue. The judgment of the New Jersey Supreme Court was mani-

festly correct and it was only Petitioners attempts to avoid responsibility for obstructing justice, that precipitated the fines and incarceration.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Respondent's Motion to Vacate Stay, a writ of certiorari should not issue to review the judgment and opinion of the New Jersey Supreme Court.

Respectfully submitted,

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HENRY F. FURST
On the Memorandum

APPENDIX

Excerpt from Transcript of Oral Argument Before New Jersey Supreme Court on September 5, 1978

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NOS. A-78-78, A-79-78, A-80-78

IN THE MATTER

OF

MYRON FARBER AND THE NEW YORK TIMES COMPANY,
CHARGED WITH CONTEMPT

(commencing at 26-11)

The Court: Well whether or not that's so, Mr. Abrams, you still haven't answered the question that was asked you ten minutes ago by Justice Mountain, and I'm interested in what your answer would be aside from the question of hearing and so forth and so on. Assume that the New Jersey Shield Law does have the broad facial protection that you argue for, and it seems to do so; suppose a reporter in the course of his investigation comes upon substantial evidence of innocence and he decides to withhold that because it will make a blockbuster story

Excerpt from Transcript of Oral Argument Before New Jersey Supreme Court on September 5, 1978

later on that they have convicted an innocent man? Can a defendant who learns that this reporter has evidence of his innocence substantial evidence tending to establish his evidence require the reporter to produce that? Or is it your position that the Shield Law would prevent him (27)* from obtaining it and that the Reporter can stand behind the Shield Law and say I don't have to produce it?

Mr. Abrams: It's my position, Justice Sullivan, that the Shield Law as applied in that situation, would be constitutional.

The Court: Would be constitutional?

Mr. Abrams: Yes, sir.

The Court: And he could stand behind it and refuse to produce evidence of innocence?

Mr. Abrams: Yes, sir. That could stand in that situation just as an attorney could stand behind the attorney-client privilege, just as the priest can stand behind the priest-penitant privilege—

The Court: I'm only asking you about a newspaper man and I have your answer that he can stand behind it?

Mr. Abrams: Yes, sir. Yes, sir. It is my position—

• • •

* Figures in parentheses refer to each new page of the stenographic transcript.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

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Petitioners,

v.

THE STATE OF NEW JERSEY AND MARIO E. JASCALEVICH
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY AND MYRON FARBER
Petitioners,

v.

THE STATE OF NEW JERSEY AND MARIO E. JASCALEVICH
Respondents.

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for a Writ of Certiorari filed herein. Although the attorneys for

Petitioners, the New York Times and Myron Farber, and the Attorney General for Respondent, the State of New Jersey, have consented to ANPA's filing of a brief as amicus curiae, the Respondent, Mario E. Jascalevich has withheld consent.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1307 newspapers constituting more than 91 percent of the total daily and Sunday newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers seventy-one members in the State of New York and twenty-nine in the State of New Jersey.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system; namely, the gathering of information for dissemination to the people of our country. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to seek out newsworthy information from sources on a confidential basis and to assert, without threat of a contempt citation, the merits of the constitutional and, where available statutory privilege against compelled disclosure thereof. Although the first amendment right of news gathering, implicated herein by petitioners' refusal to divulge information gathered from confidential news sources, is not unlimited, *Houchins* v. *KQED, Inc.*, ____U.S.____, 57 L.Ed.2d 553 (1978), it nevertheless is entitled to both substantive and

procedural constitutional protections. See, *Branzburg*, v. *Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974); *Baker* v. *F. & F. Investment Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Tribe, American Constitutional Law*, §§12-34, 35, 36 (1978).

The contempt judgments against petitioners, upheld by the Supreme Court of New Jersey, not only constitute a serious intrusion upon the privilege which protects a newsman's sources, but, more importantly, they represent a clear abuse of the trial court's inherent power to punish for contempt and a shocking denial of the fundamental right of due process. The trial court's denial to petitioners of their right to be heard in the instant case is a more egregious violation of constitutional rights than was the "gag order" recently overturned by this Court in *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976). In that case, it was the trial court's insensitivity to the significant First Amendment values involved which led to entry of the erroneous order. In the instant case, a similar insensitivity has been exacerbated by the trial court's refusal to honor the dictates of procedural due process.

Because of the importance of the issues sought to be presented to this Court by the Petition for a Writ of Certiorari, ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant issues involved in this proceeding.

WHEREFORE, the American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit ANPA to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-540

THE NEW YORK TIMES COMPANY AND MYRON FARBER
Petitioners,

v.

THE STATE OF NEW JERSEY AND MARIO E. JASCALEVICH
Respondents.

BRIEF AMICUS CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (ANPA) submits this brief amicus curiae in support of Petitioners', The New York Times and Myron Farber, Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief and as restated herein, ANPA and its members have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged.

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1307 newspapers constituting more than 91 percent of the total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper business and, over the years, ANPA on several occasions has presented its views to the Supreme Court of the United States and to other federal and state appellate courts. ANPA numbers seventy-one members in the State of New York and twenty-nine in the State of New Jersey.

In its efforts to stay abreast of the broad realm of matters affecting the people of our country as served by our newspaper members, and the journalists who work for them, ANPA is ever vigilant to protect the public's right, under the First Amendment, to information concerning the activities of government and matters of public interest. ANPA and its members are vitally interested in protecting and maintaining the primary function of newspapers under our value system: namely, the gathering of information for dissemination to the people of our country. To insure the free and uncensored flow of information to the public, daily newspapers and their employees must be free to seek out newsworthy information from sources on a confidential basis and to assert, without threat of a contempt citation, the merits of the constitutional and, where available, statutory privilege against compelled disclosure thereof. Although the first amendment right of news gathering, implicated herein by petitioners' refusal to divulge information gathered from confidential news sources, is not unlimited, *Houchins* v. *KQED, Inc.*, ___*U.S.*___, 57 L.Ed. 2d 553 (1978), it nevertheless is entitled to both substantive and procedural constitutional protections. See, *Branzburg*, v. *Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974); *Baker* v. *F. & F. Investment Co.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Tribe, American Constitutional Law*, §§12-34, 35, 36 (1978).

ANPA filed a brief amicus curiae in this case before the Supreme Court of New Jersey in which it presented many of the same views as are reflected in the dissent of Justice Pashman. (Appendix A to Petition). The contempt judgments entered by the trial court, and affirmed by the Supreme Court of New Jersey, represent serious breaches of the limits provided by the First Amendment and the Due Process Clause of the Fourteenth Amendment. Because of the importance of this issue as it relates to the questions sought to be placed before this Court by the Petition for a Writ of Certiorari, ANPA desires to present to this Court, for its assistance, the Association's views in regard to the significant issues involved in this proceeding.

Questions Presented, Constitutional and Statutory Provisions Involved and Statement of the Case

ANPA adopts the questions presented, constitutional and statutory provisions involved and statement of the case, all as set forth in the Petition for a Writ of Certiorari.

ARGUMENT

In reviewing the contempt judgments against petitioners, the Supreme Court of New Jersey stated:

> While we agree, then, that appellants should be afforded the hearing they are seeking, one procedural aspect of which calls for their compliance with the order for *in camera* inspection, we are also of the view that they, and those who in the future may be similarly situated, are entitled to a preliminary determination before being compelled to submit the subpoenaed materials to a trial judge for such inspection.

Notwithstanding, that court affirmed the judgments of contempt, while recognizing that "Judge Arnold refused to give

ultimate rulings with respect to relevance and other preliminary matters." In his opinion, rendered June 30, 1978, Judge Arnold stated that he would neither grant a "full hearing" nor decide if production was barred by the Constitution, the New Jersey "Shield Law," or other legitimate defenses, until petitioners had complied with the order to produce the materials sought *in camera*. (Appendix C to Petition at 62a). There can be no question that petitioners were denied their fundamental due process right which mandates that they be afforded the opportunity to be heard.

Last term, in *Zurcher* v. *Stanford Daily*, ____ U.S. ____, 56 L.Ed. 2d 525 (1978) this Court held constitutional under the First and Fourth Amendments, a search of a newspaper office for evidence of a crime, pursuant to a search warrant issued after a showing of probable cause that evidence of a crime was in the newspaper's possession. Respondent newspaper had argued that a subpoena *duces tecum* should have been utilized as an alternative to the more intrusive police search pursuant to a warrant. In rejecting this contention, Justice White, writing for the court noted that:

> [T]he delay involved in employing the subpoena *duces tecum, offering as it does the opportunity to litigate its validity,* could easily result in the disappearance of the evidence, whatever the good faith of the third party. 56 L.Ed. 2d at 539 (emphasis added).

It was argued in *Zurcher* that the issuance of a search warrant, directed against innocent third parties believed to be in the possession of evidence of a crime, provided insufficient safeguards. As Justice White recognized, individuals who are served with subpoenas requiring the production of materials in connection with a criminal proceeding are accorded the protections of the requirements of due process. The Court pointed out, however, that similar safeguards exist in the case of the warrant procedure since all of the protections of the Fourth Amendment obtain, and the judiciary plays a crucial role by

requiring "probable cause, specificity with respect to the place to be searched and the things to be seized and overall reasonableness." 56 L.Ed. 2d at 541.

The implication of the court's reasoning is clear. In the case of a search warrant, judicial intervention is mandated by the Fourth Amendment, and occurs at the time of the probable cause hearing. In the case of a subpoena, a party must be given the "opportunity to litigate its validity" by means of a hearing on a motion to quash, repeatedly alluded to by the majority opinion in *Zurcher*.

Petitioners herein have had no such opportunity to litigate the validity of the subpoena. The trial judge has summarily ordered them to comply with the subpoena on pain of contempt based solely on the *ex parte* representations of defense counsel in a murder case.

Your *amicus* asserts that the standards of reasonableness required by the Fourth Amendment, which mandate a finding of probable cause and careful limitation of the scope of any search, apply equally in cases where an individual's "private papers" are the subject of subpoenas. In *Bowman Dairy Co.* v. *United States*, 341 U.S. 214 (1951), this Court held that a party could not be held in contempt for refusing to comply with a "catch-all provision" of a subpoena which was not designed to produce admissible evidence, but was rather a device to facilitate a "fishing expedition." *Id.* at 221. This Court stated:

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to tell the good from the bad. *Id.*

The subpoena at issue is clearly overbroad on its face. As the above cited case indicated, this Court will no more sanction the enforcement of a patently overbroad subpoena, than it will uphold the validity of an overbroad and unreasonable search

since, as Justice White clearly indicates in *Zurcher*, the "privacy interests" to be protected are the same whether threatened by unreasonable warrant or overbroad subpoena. See, 56 L.Ed. 2d at 539-40.

In recognition of the need to protect "privacy interests," as well as the equally important need to protect "privileged" or "confidential" information, both the courts and the executive branch have formulated basic principles which apply when information is sought from a third party in connection with a criminal proceeding. In such situations, the party seeking information has the initial burden of establishing relevancy, materiality, necessity for production of the materials, and unavailability of the materials from other sources. The requirement that a seeking party meet this threshold burden is reflected in Federal Rule of Criminal Procedure 17(c) and regulations governing the issuance of subpoenas by federal prosecutors to members of the press.

Section 50.10 of Title 28 of the Code of Federal Regulations requires that before a federal prosecutor may issue a subpoena directed at a member of the news media, he must obtain the approval of the U.S. Attorney General who is required to balance the competing interests of the public in the free dissemination of information against the need for effective law enforcement and the fair administration of justice. In striking the balance, the Department of Justice must consider the following factors: (1) there must be reasonable belief based on non-media information that a crime has occurred; (2) there should be reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to establishing guilt or innocence; (3) the government should have unsuccessfully attempted to obtain the information from alternative non-media sources; (4) except under exigent circumstances subpoenas should be limited to verification of published information; (5) even the appearance of harrassment of media personnel should be avoided; (6)

subpoenas should be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of the newsperson's unpublished material.

These guidelines reflect the strong public policy of the executive branch against requiring testimony from newspersons in the absence of compelling need on the part of government. Moreover, the specificity requirement is fully consistent with this Court's holding in *Bowman Dairy, supra.*

In addition to these substantial federal administrative protections, the courts have recognized the necessity for narrowly circumscribed subpoenas, and the importance of allowing a full hearing on the overbreadth issue pursuant to a motion to quash. Under the Federal Rules of Criminal Procedure it is insufficient to seek production of documents on the bare assertion that they may be useful to the seeking party. There must be a showing of "good cause" to entitle the seeking party to the production and inspection of documents under Rule 17(c). The moving party has the burden of establishing such "good cause" by showing: 1) that the documents sought are evidentiary and relevant: 2) that they are not otherwise procurable by the defendant; and 3) that the application is made in good faith and is not intended as a "fishing expedition." Rule 17(c) does not authorize rummaging through files at will, and, therefore, any request for production must be specific. *United States* v. *Nixon*, 418 U.S. 683 (1974); *United States* v. *Iozia*, 13 F.R.D. 335 (S.D.N.Y. 1952).

In *United States* v. *Nixon*, 418 U.S. 683 (1974), the then President of the United States, Richard M. Nixon, a third party not directly involved in the criminal trial in question, was afforded an extensive hearing, pursuant to a motion to quash subpoenas directing him to produce confidential papers and tapes from his personal files. Following a "lengthy and detailed showing [of the government's] need, for the subpoenaed items and their relevance," the President was required to turn over his private papers and tapes for *in camera* inspection.

If the decision of the New Jersey Supreme Court denying petitioners' right to a similar showing is allowed to stand, it can only create the impression that two standards exist for protecting the due process rights of third parties who allegedly possess material related to criminal trials—one for Presidents and another for newspapers and journalists.

In yet another Watergate related case, *United States* v. *Liddy*, 354 F.Supp. 208, (D.D.C.), *motion for stay denied*, 478 F.2d 586 (D.C.Cir. 1972), Chief Judge John Sirica enforced a subpoena directed at a newsman, but only after affording a full hearing to determine the need for the information, and the exhaustion of alternative sources. As Judge Sirica pointed out in his opinion, the case presented "unique facts." Before his trial for Watergate activities began, Liddy sought, for purposes of impeachment at trial, materials in the possession of Alfred C. Baldwin III, a key government witness who claimed to have personally observed the Watergate bugging. Baldwin's response to Liddy's initial subpoena was that he had given the materials to John Lawrence, Washington Bureau Chief and staff writer for the Los Angeles Times. Liddy then directed a second subpoena, limited to materials admissible in evidence for impeachment, to Lawrence. Judge Sirica denied a motion to quash by The Times and ordered Lawrence to produce the materials.

The result was reached only after it was shown at the hearing that the defendant sought only relevant information, admissible in evidence and that the only alternative source had been exhausted. There was never any suggestion that *in camera* disclosure prior to such a showing was ever considered. Judge Sirica further emphasized the limited nature of the materials sought:

> [w]e are not dealing here with documents or objects subpoenaed for discovery purposes. This is not the "fishing expedition" which exceeds the authority conferred and objective contemplated by Rule 17. The defendants seek only those statements on the tapes, if any, which may be admissible as impeachment evidence. The Court will not allow the materials produced pursuant to the subpoena to be employed by the parties as a springboard for discovery. *Id.* at 212.

Judge Sirica's approach is in accord with several recent cases decided by State Supreme Courts which rejected attempts by criminal defendants to compel disclosure of news sources. In *State* v. *St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974), the court held that "legitimate objections to disclosure based on First Amendment grounds require careful evaluation by the judicial officer before answers are compelled, or the sanctions of fine or imprisonment imposed," *Id.* at 256; and, that on the facts disclosure was not required because defendant established neither relevance nor that the information wasn't otherwise available. Similary, in *Brown* v. *Commonwealth*, where a defendant in a murder case sought evidence for impeachment, the Virginia Supreme Court held that a reporter's confidential sources are protected by "a privilege related to the First Amendment," which requires that the information sought be "material" and "essential to a fair trial." 214 Va. 755, 204 S.E. 2d 429, 431 *cert. denied*, 419 U.S. 966 (1974). *See also*, *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wisc. 1978).

In all of the above cases, the courts accorded the individuals in possession of the materials sought to be discovered an opportunity to be heard in opposition to the subpoenas issued; moreover, the courts rendered a decision on the availability of the materials *only after* having first made a determination as to whether the seeking parties had made a showing sufficient to overcome the threshold burden. In no case of which your *amicus* is aware, except that sought to be placed before the Court herein, has a court ordered the production of materials by a third party, in connection with a criminal proceeding, prior to having held a full hearing and having ruled on any asserted

defenses to production. See, *e.g.*, *United States* v. *Orsini*, 424 F.Supp. 229 (E.D.N.Y. 1976), *aff'd.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Kansas* v. *Sandstrom*, 4 Med.L.Rep. 1333 (Kan. 1978); *Rosato* v. *Superior Court*, 41 Cal. App.3d 190 (1975), *cert. denied*, 427 U.S. 912 (1976); *Farr* v. *Superior Court* 22 Cal.App.3d 60, *cert. denied*, 409 U.S. 1011 (1971); *Morgan* v. *Florida*, 337 So. 2d 95 (Fla. 1976); *New Jersey* v. *De La Roche*, 3 Med.L.Rep. 2317 (N.J.Super.Ct. 1977).

In the instant case, however, the trial court denied a hearing and refused to render a ruling on the validity of petitioners' motion to quash. Thereafter, in the contempt proceedings, Judge Trautwein, without examining into or permitting full analysis of the asserted privileged nature of the materials sought, held petitioners in contempt for failing to obey the subpoena and Judge Arnold's order. This was a fundamental denial of due process. It is not enough to say that petitioners were granted a hearing; the hearing must be a "meaningful" one. *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The fact that the judge, who witnessed the alleged contempt, may have stated his reasons and allowed response to his intent to hold petitioners in contempt does not relieve the trial court of its responsibility to grant a full and meaningful hearing. *Taylor* v. *Hayes*, 418 U.S. 488, 498-500 (1974). It is fundamental to the concept of due process that a party must be afforded an opportunity to be heard by the court. If the court fails or refuses to grant such an opportunity, especially where the privileged nature of the materials sought has been asserted, it is gross error for the court to enter judgments of contempt against the individual in possession of the information. This concept has been recognized with regard to assertions of the privilege against self-incrimination, and is clearly applicable in the instant case:

> On the other hand, refusal to answer a question in order that the witness may in good faith interpose even an unfounded objection to making answer thereto, and obtain a ruling of court thereon is not unjustifiable, and is wholly within the rights of the witness. In such case to be unjustifiable and constitute contempt the refusal to answer must be made *after the court has ruled upon the question of privilege* and directed that answer be made.

Gendron v. *Burnham*, 82 A.2d 773 (Me. 1951) (emphasis added); *cf.*, *Maness* v. *Meyers*, 419 U.S. 449 (1975).

The contempt power, while an inherent power of the courts, is an "arbitrary" power which is "liable to abuse." *Ex Parte Terry*, 128 U.S. 289, 313 (1888). "Its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). This Court has long been sensitive to the abuses which may attend the contempt power, and, for that reason, has been especially cognizant of the due process considerations which attend any use of that power. In *Taylor* v. *Hayes*, *supra*, this Court reversed contempt convictions stemming from a lawyer's conduct during a trial. Despite the fact that the attorney had been permitted to respond on each occasion in which the trial court had indicated that he would be held in contempt, this Court held that the summary contempt citations entered against the attorney at the termination of the trial constituted a denial of due process. In that case, at each occurrence, the attorney was permitted to respond. In the instant case, the petitioners have never even been allowed the right to insist that the moving parties for disclosure of information present testimony and/or evidence which would establish a putative right to the materials sought.

In the instant case, petitioners have been presented with orders requiring them to perform affirmative acts (*i.e.*, turn over the materials requested) and have been held in contempt for refusing to obey such orders in the absence of any opportunity to fully argue the legality of such orders. Entry of contempt orders in such situations was recognized as a clear

abuse of judicial power by this Court long before "procedural due process" became a fully developed judicial doctrine. In *Hovey* v. *Elliott,* 167 U.S. 409 (1897), in overturning a contempt conviction, this Court stated:

> A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.
>
> * * *
>
> Can it be doubted that due process of law signifies a right to be heard in one's defense." If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In *Galpin* v. *Page,* 85 U.S. 350, 368 (1874), the court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."
>
> * * *
>
> If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

167 U.S. at 414-419.

In light of this Court's approach to the question of due process in both *Hovey* v. *Elliott, supra,* and *Galpin* v. *Page, supra,* it would appear unconscionable to this amicus that this Court could permit the majority decision of the Supreme Court of New Jersey in this case to stand. What the ultimate result might be in today's state of the jurisprudence as regards the First Amendment question is immaterial. That question cannot

be reached until first there has been procedural due process. What is material is that even a newspaper and reporter are entitled to at least the due process afforded a member of the general populace. Need we remind this Court that it has very pointedly stated in at least two cases in the past term that journalists are entitled to no more, but certainly no less, rights than the general populace. *Houchins* v. *KQED, inc.*, ___ U.S. ___, 57 L.Ed.2d 553 (1978); *Zurcher* v. *Stanford Daily*, ___ U.S. ___, 56 L.Ed.2d (1978). If there be any consistency in the law today, it is inconceivable to this amicus that a different type of due process or none at all can be afforded newspapers and reporters as has happened in the case before this Court. To uphold such a ruling would represent pure sophistry and miscarriage of justice that could not help but bring about a drastic philosophical conflict within major segments of our populace.

This amicus cannot emphasize too strongly its absolute abhorrence of the lack of procedural due process afforded the petitioners in this matter by both the trial courts of New Jersey and by the New Jersey Supreme Court.

CONCLUSION

It is respectfully urged that this Court grant the Petition for a Writ of Certiorari in order that the significant constitutional issues raised therein may be fully examined.

Respectfully submitted,

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